

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING : CIVIL ACTION
ARTISTS by JAMES J. WALKER and :
FRED WARING, Trustees Ad Litem :

vs. :

WM. PENN BROADCASTING COMPANY, :
P. B. WHITE CO., INC., :
KEITH TAILORS, INC., :
ROYAL SHOE MARKET, INC., :
MORRIS EISENBERG and HERMAN :
SCHAEFFER, Individually and :
Trading as : No. 939
BAILEY'S FURNITURE CO. :

STIPULATION FOR DISMISSAL WITHOUT
PREJUDICE

AND NOW, to wit: this 20th day of January, 1942, it is
stipulated that the above captioned action may be dismissed
without prejudice and without costs.

FILED

JAN 24 1942

GEORGE BROUBECK, Clerk

[Signature] Dpty. Clerk

[Signature]

HERBERT A. SPEISER, ESQ.,
Attorney for Plaintiff

[Signature]
PHILIP WERNER AMRAM, ESQ., Attorney
for Wm. Penn Broadcasting Company,
P. B. White Co., Inc., Royal Shoe
Market Inc., Morris Eisenberg and
Herman Schaeffer, Ind. & Trdg. as
Bailey's Furniture Co.

[Signature]

I. JACK FEINSTEIN, ESQ.,
Attorney for Keith Tailors, Inc.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING :
ARTISTS, by James J. Walker and : CIVIL ACTION
Fred Waring, Trustees ad litem :

v. :

WILLIAM PENN BROADCASTING COMPANY : FILE #939

INTERROGATORIES ADDRESSED
TO THE PLAINTIFF IN ACCOR-
DANCE WITH RULE 33

FILED
OCT 16 1941
GEORGE BRODIECK, Clerk
By *GMS* Dpty Clerk

1. On what date did Benny Goodman join the plaintiff organization?
2. Did Benny Goodman sign any application blank or any other document evidencing membership; if so, please attach copy thereof.
3. Did Benny Goodman sign an agreement or document transferring to the plaintiff association any rights or property which he might have in the records designated as "A" and "C" of paragraph 13 of the Plaintiff's Bill of Complaint? If so, attach a copy thereof.
4. Did Benny Goodman make the records "Bluebirds in the Moonlight" and "Heaven in my Arms" for the Columbia Recording Corporation under a written contract or contracts? If so, attach a copy of any such contracts and also give the dates of the making of the said records and the dates on which they were first offered publicly for sale by the Columbia Recording Corporation through its regular distribution channels.
5. Who made the arrangement of the records "Bluebirds in the Moonlight" and "Heaven in My Arms" as recorded by Benny Goodman in the recordings above recited?

6. Did Benny Goodman secure the consent of the copyright owner to the making of such arrangement? If so, attach a copy of such consent.

7. Did Benny Goodman copyright the arrangement? Was such arrangement the property of Benny Goodman and did he arrange for the copyright thereof? If not, was such arrangement the property of any other person, firm or corporation and, if so, did they copyright the same and give Benny Goodman a license to use such arrangement? If the answer to any of the questions above is in the affirmative, please attach copies of all relevant documents.

8. How many recordings of Benny Goodman were on the open market on December 1, 1937? How many on January 25 and 26, 1940?

9. On what date did Hal Kemp join the plaintiff organization?

10. Did Hal Kemp sign any application blank or any other document evidencing membership; if so, please attach copy thereof.

11. Did Hal Kemp sign an agreement or document transferring to the plaintiff association any rights or property which he might have in the record designated as "B" of paragraph 13 of the Plaintiff's Bill of Complaint? If so, attach a copy thereof.

12. Did Hal Kemp make the record "Oh! What You Said" for the RCA Manufacturing Co., Inc., under a written contract? If so, attach a copy of any such contract and also give the date of the making of the said record and the date on which it was first offered publicly for sale by the RCA Manufacturing Co., Inc., through its regular distribution channels.

13. Who made the arrangement of the record "Oh! What You Said" as recorded by Hal Kemp in the recording above recited?

14. Did Hal Kemp secure the consent of the copyright owner to the making of such arrangement? If so, attach a copy of such consent.

15. Did Hal Kemp copyright the arrangement? Was such arrangement the property of Hal Kemp and did he arrange for the copyright thereof? If not, was such arrangement the property of any other person, firm or corporation and, if so, did they copyright the same and give Hal Kemp a license to use such arrangement? If the answer to any of the questions above is in the affirmative, please attach copies of all relevant documents.

16. How many recordings of Hal Kemp were on the open market on December 1, 1937? How many on January 25 and 26, 1940?

17. On what date did Johnny Green join the plaintiff organization?

18. Did Johnny Green sign any application blank or any other document evidencing membership; if so, please attach copy thereof.

19. Did Johnny Green sign an agreement or document transferring to the plaintiff association any rights or property which he might have in the record designated as "D" of paragraph 13 of the Plaintiff's Bill of Complaint? If so, attach a copy thereof.

20. Did Johnny Green make the record "All the Things You Are" for the U. S. Record Corp. under a written contract? If so, attach a copy of any such contract and also give the date of the making of the said record and the date on which it was first offered publicly for sale by the U. S. Record Corp. through its regular distribution channels.

21. Who made the arrangement of the record "All the Things You Are" as recorded by Johnny Green in the recording above recited?

22. Did Johnny Green secure the consent of the copyright

owner to the making of such arrangement? If so, attach a copy of such consent.

23. Did Johnny Green copyright the arrangement? Was such arrangement the property of Johnny Green and did he arrange for the copyright thereof? If not, was such arrangement the property of any other person, firm or corporation and, if so, did they copyright the same and give Johnny Green a license to use such arrangement? If the answer to any of the questions above is in the affirmative, please attach copies of all relevant documents.

24. How many recordings of Johnny Green were on the open market on December 1, 1937? How many on January 25 and 26, 1940?

25. How many members did the plaintiff organization have on December 1, 1937? How many on January 25 and 26, 1940?

26. How many recordings of all the members of the plaintiff organization were on the open market on December 1, 1937? How many on January 25 and 26, 1940?

27. Did the plaintiff organization on or about December 17, 1937, enter into a contract with the defendant under the terms of which the defendant received a license purporting to permit the defendant to perform publicly by broadcasting from Station WPEN any phonograph records containing performances by any of the members of the Association, such license being at the rate of One Thousand Dollars (\$1,000.00) per annum for unlimited use of all of the recordings of all of the members of the association? Is the copy of the agreement attached hereto and marked "Exhibit 1" a true and correct copy thereof?

28. Did the plaintiff organization, on or about December 11, 1939, offer to the defendant a proposed renewal of the said contract, for a period beginning December 1, 1939,

upon identical terms and conditions, saving and excepting only that there was inserted in said agreement an additional clause numbered 8, reading substantially as follows:

"In the event of any dispute between Wm. Penn Broadcasting Company and the American Federation of Musicians, this license shall forthwith become null and void"

and did the plaintiff organization at that time refuse to grant to the defendant any license except with the inclusion of the said clause quoted, or a clause substantially similar thereto?

29. Did the defendant, on or about January 10, 1940, offer to make an agreement with the plaintiff organization purporting to act on behalf of all of its members under which the defendant would take a license for a period of one year beginning December 1, 1939, upon identical terms and conditions as the said agreement marked Exhibit 1, and provided that the proposed new clause 8 (quoted in Interrogatories No. 28, supra) was eliminated? Did the plaintiff organization refuse to grant such license to the defendant and did the plaintiff organization refuse to grant the defendant any license whatever except with the inclusion of the clause numbered 8 as stated in Interrogatories No. 28 above?

30. Has the plaintiff organization granted licenses purporting to grant the right to use phonograph recordings of all members of the organization to other broadcasting stations in the City of Philadelphia?

31. Did the plaintiff organization at or about December, 1939, issue licenses to other broadcasting stations in the City of Philadelphia or elsewhere in the Commonwealth of Pennsylvania? If so, please give full details with respect to such other contracts, specifically designating whether such contracts contain any clause in any manner similar to the American Federation of Musicians clause quoted above in Interrogatory No. 7.

32. Did the plaintiff organization pay any part of the costs, expenses or counsel fee in connection with the pending litigation? If so, what portion of the costs and expenses did they pay, and who paid costs, expenses or counsel fees which were not paid by the plaintiff organization? Furnish full details.



PHILIP WERNER AMRAM,
Attorney for Defendant.

DATED: October 16, 1941.

AGREEMENT between HERBERT A. SPEISER and RAYMOND A. SPEISER, Attorneys-in-Fact for NATIONAL ASSOCIATION OF PERFORMING ARTISTS (hereinafter called "Association"), and WILLIAM PENN BROADCASTING COMPANY (hereinafter called Licensee").

1. Association grants to Licensee, its successors and assigns, and Licensee accepts for a term of one year from December 1st, 1937, a license to publicly perform by broadcasting from radio station WPEN, located at Philadelphia, Pennsylvania, renditions of the performances of members of the Association, made for use on phonographs.

2. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the said renditions of the performances coming within the purview of the within license broadcast pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever. Provided, however, that Licensee shall have no liability for any performance or reproduction of the same by any receiver of such broadcast rendition unless the same is done by authorization of Licensee.

3. The within license is strictly limited to renditions of the performances for phonograph use, heretofore or hereafter, during the term hereof, made by members of Association, in programs rendered at or from said radio station, or at or from any other place duly licensed by Association to perform such works, from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast therefrom.

W. Exhibit 1.

4. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Association, as compensation for the within license, the sum of ONE THOUSAND (\$1,000.00) DOLLARS per annum, payable in equal quarterly installments in advance, beginning December 1st, 1937. Payments to be made to the order of HERBERT A SPEISER and RAYMOND A SPEISER, Attorneys-in-Fact, at 1000 Girard Trust Building, Philadelphia, Pennsylvania.

5. Association reserves the right at any time and from time to time, to withhold or withdraw from the grant of this license, any phonograph record made by a member of the Association. Association shall, however, first give at least forty-eight hours written notice of such withdrawal to Licensee; and such withdrawals shall not be made as will seriously interfere with or defeat the rights granted under this license.

6. Association agrees to indemnify, save and hold Licensee harmless and defend Licensee from and against any claim, demand or suit which may be made or brought against the Licensee by any member of the Association (or if the said member of the Association shall be the leader, conductor or head of any orchestra or ensemble which shall have made the recording, then against any claim, demand or suit which may be made or brought against the Licensee by any member of such orchestra or ensemble) by reason of any broadcasts made in accordance with this license.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee, as provided in paragraph 6 hereof, Licensee shall forthwith give Association written notice thereof and simultaneously therewith deliver to Associa-

tion written notice thereof and simultaneously therewith deliver to Association any such notice, process, paper or pleading, or a copy thereof, and Association shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Association shall cooperate. Licensee shall cooperate with Association in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Association, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

7. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at the addresses given below.

IN WITNESS WHEREOF, the said HERBERT A. SPEISER and RAYMOND A. SPEISER, Attorneys-in-Fact for Association, have hereunto set their hands and seals, and the WILLIAM PENN BROADCASTING COMPANY has hereunto caused its corporate seal to be hereto affixed, duly attested this 17th day of December, A. D. 1937.

WITNESS:

(SGD) HERBERT A. SPEISER
(SGD) RAYMOND A. SPEISER
Attorneys-in-Fact for NATIONAL
ASSOCIATION OF PERFORMING ARTISTS

(SGD) GERTRUDE C. GOLDFINE

WILLIAM PENN BROADCASTING COMPANY

By: (SGD) HYL A KICZALES
Sec'y.

Attest: (SGD) D. HAYS SOLIS-COHEN
Vice-Pres.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING : CIVIL ACTION
ARTISTS by JAMES J. WALKER and :
FRED WARING, Trustees Ad Litem :

Vs. :

WM. PENN BROADCASTING COMPANY, :
P. B. WHITE CO., INC., :
KEITH TAILORS, INC., :
ROYAL SHOE MARKET, INC. :
MORRIS EISENBERG and :
HERMAN SCHAEFFER, Individually :
and Trading as :
BAILEY'S FURNITURE CO. : FILE NO. 939
:

ORDER TO PLACE ON TRIAL LIST

TO THE CLERK OF THE DISTRICT COURT:

Please place the above entitled case on the
Trial List.

FILED

SEP 12 1941

GEORGE BRODBECK, Clerk

By G. W. L. Dpty Clerk

9/12/41

SPEISER & SPEISER

Hubert A. Speiser

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC.,
KEITH TAILORS, INC.,
ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG and
HERMAN SCHAEFFER, Individually
and Trading as
BAILEY'S FURNITURE CO.

CIVIL ACTION

FILED

SEP 5 - 1941

GEORGE BRODDECK, Clerk

FILE No. 939

ANSWER OF DEFENDANTS P. B. WHITE CO., INC.,
KEITH TAILORS, INC., ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG and HERMAN SCHAEFFER,
Individually and Trading as BAILEY'S
FURNITURE CO.

First Defense

These defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 7, 8, 9, 10 and 11 of the Complaint, and deny each and every other allegation contained in the Complaint.

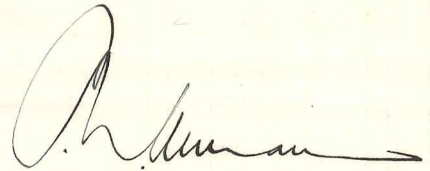
Second Defense

Defendants incorporate herein by reference all of the averments of the second, third, fourth and fifth defenses in the Answer filed by Wm. Penn Broadcasting Company.

Third Defense

Pursuant to hearings heretofore had, it has already been adjudicated by this court that the plaintiffs have no

right of action or right of recovery against these defendants for the reasons set forth in the opinion of Honorable Guy K. Bard, Judge of your Honorable Court, heretofore filed in this action.



Philip Werner Amram,
1204 Packard Building,
Philadelphia, Penna.



I. Jack Feinstein,
1203 Market St. Nat'l. Bank Bldg.,
Philadelphia, Penna.

Attorneys for Defendants.

WOLF BLOCK SCHORR & SOLIS-COHEN,
Counsel

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING : CIVIL ACTION
ARTISTS, by JAMES J. WALKER and :
FRED WARING, Trustees Ad Litem :

vs. :

WM. PENN BROADCASTING COMPANY : FILE NO. 939

DEFENDANT'S ANSWER TO PLAINTIFF'S
BILL OF COMPLAINT

FILED

JUL 29 1941

First Defense

General Counsel, Clerk
By *CWS* Deputy Clerk

Defendant admits the allegations contained in paragraphs 2 and 10 of the Complaint; alleges that the averments of paragraphs 3, 4, 5, 6 and 12 are irrelevant and immaterial; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 7, 8 and 9; denies each and every other allegation contained in the complaint.

Second Defense

Plaintiffs have a full, complete and adequate remedy in money damages for the fair value of the use by defendant of the property, if any, belonging to the particular members of the plaintiff referred to in the complaint.

Third Defense

Plaintiffs are not the owners of any property right, nor are they entitled to the relief sought herein.

Fourth Defense

Plaintiffs are entitled to no equitable relief, having come into this court with unclean hands because

- (a) plaintiffs are an unlawful combination for the purpose of creating a monopoly;
- (b) plaintiffs offered to all other radio stations in the City of Philadelphia and vicinity the right to broadcast for a money consideration, the records of the alleged members of the plaintiff unconditionally, but offered the right to broadcast the same to the defendant only upon condition that the defendant maintain contract relationships with the American Federation of Musicians; in matters entirely disconnected therewith;
- (c) the alleged members of the plaintiff organization referred to in paragraph 13 of the complaint have themselves violated the copyright in the musical compositions designated in paragraph 13 of the complaint.

Fifth Defense

Any alleged property rights in the alleged members, referred to in paragraph 13 of the complaint and which are the basis of the complaint, are and, prior to January 1940, were the property of the recording companies which manufactured

the phonograph records listed in paragraph 13 of the complaint. Said recording companies are not parties hereto and the plaintiffs named herein do not purport to represent them, but, on the contrary, are antagonistic to them.



Philip Werner Anram,
Attorney for Defendant,
1204 Packard Bldg.,
Philadelphia, Penna.

WOLF, BLOCK, SCHORR & SOLIS-COHEN, ESQS.,
Counsel.

Attached hereto is opinion in National Association
of Performing Artists vs. Wm. Penn Broadcasting Company et al
decided April 25, 1941 by Judge Guy K. Bard.

Attorneys for Plaintiff: Herbert A. Speiser and Speiser & Speiser
All of Philadelphia, Pa.

Attorneys for Defendants: Philip Werner Amram and Wolf, Block,
Schorr and Solis-cohen, all of Philadel-
phia, Pennsylvania

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS, by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC.
KEITH TAILORS, INC.,
ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG AND HERMAN
SCHAEFFER, individually and trad-
ing as BAILEY'S FURNITURE CO.

CIVIL ACTION

FILE NO. 939

FILED

APR 25 1941

ON PLAINTIFF'S MOTION TO REMAND

GEORGE BRUDBECK, Clerk
By *GWS* Dpty Clerk

OPINION

APRIL 25, 1941

Bard, J.
BARD, J.:

This case comes before the Court at this time on plaintiff's motion to remand to the Common Pleas Court of Philadelphia County, Pennsylvania, from which court it was removed on the application of the defendant, Wm. Penn Broadcasting Company.

The plaintiff's bill in equity alleges that the defendant Wm. Penn Broadcasting Company owns and operates a radio station; that the other defendants contracted with the management

of this station for advertisement of the business of these other defendants; and that on programs advertising these businesses, phonograph records, made by members of the plaintiff association, were played and broadcast without permission of plaintiff and in violation of the property rights of the plaintiff.

The particular relief sought in the bill is an injunction restraining all defendants from using or causing to be used any phonograph records embodying renditions, interpretations and performances of any member or members of the plaintiff, for radio broadcast or any other commercial use without the consent or permission of the plaintiff. The bill concludes with the customary plea for further relief as may seem just and proper.

Defendants Wm. Penn Broadcasting Company and P. B. White Co., Inc. are corporations organized and existing under the laws of the State of Delaware. The other defendants are Pennsylvania corporations or individual residents of Pennsylvania.

In its petition for removal, the Wm. Penn Broadcasting Company alleged that the action involves a controversy solely between the plaintiff and it, and that the other defendants were improperly joined to prevent removal of the cause. After argument had, the petition for removal was granted by the State court.

Pursuant to its position that the suit does not involve a controversy solely between the Wm. Penn Broadcasting Company and the plaintiff, one within the jurisdiction of a federal court, the plaintiff has moved that the action be remanded to the State court. The plaintiff contends that all of the defendants are involved in the controversy.

Testimony was taken before the court to enable

determination of the relationship of the defendant advertisers to the defendant station and to the programs during which their businesses were advertised. In the light of this evidence it appears that none of the defendant advertisers had the right to or did exercise any control over the determination of what records were to be played. Those who designated particular programs during which their advertisements were to be read knew the nature of the entertainment broadcast or the program in which they participated. The other, who contracted for announcements at particular times between programs or at times chosen by the radio station, did not participate in any manner, and usually had no interest in or concern for the character of the programs at, before, or after the time its advertisements were read. None contracted for a particular period during which it could determine the nature or identity of entertainment broadcast, and admittedly none had any control whatever over the program preceding or following their announcements. In other words, choice and playing of the records were in all cases controlled exclusively by the defendant station.

The plaintiff urges that, assuming an utter lack of control by the defendant advertisers over the defendant station's selection and execution of programs, it does not necessarily follow that the complaint fails to state a claim against the defendant advertisers. This proved lack of control, it is argued, does not determine the complaint to be legally insufficient.

It is well settled, under the pertinent law, that a performer who makes a phonograph record and causes to be affixed thereto a notice of a restriction that it is not licensed for commercial radio broadcast, may restrain the use of such by

a radio station. *Waring v. WDAS Station, Inc.*, 327 Pa. 433.

Whether this restraint can be extended to an advertiser who has and exerts no control over the conduct of the broadcasts during or between which advertising announcements, with no relation to the broadcast entertainment, are read, appears to be a question upon which there has been no illumination.

The plaintiff contends that this is a doubtful question, one that might, on trial, be resolved in its favor. It further contends that, on the instant motion, this court should not determine doubtful questions of law, that such must be tried in the court which has jurisdiction. In this latter contention, the plaintiff is supported by authority. *Chicago, R. I. & Pac. Ry. v. Schwyhart*, 227 U. S. 184; *Locke v. St. Louis-San Francisco Ry. Co.* 87 F. 2d 418; *Ervin v. Texas Co.*, 97 F. 2d 806. However, I am decided that the restraint applied in the *Waring* case, *supra*, cannot be extended to the instant defendant advertisers, and that, therefore, there is no doubtful question which might be resolved in the plaintiff's favor.

Inasmuch as the defendant advertisers have not exercised, threatened to exercise or had the power to exercise any control over the acts of the station in playing records, I am decided there has not been, is not now, and does not promise to be, any violation of the plaintiff's property rights by the defendant advertisers. I am, therefore, altogether unable to define any basis upon which an injunction could issue restraining the defendant advertisers.

Furthermore, it is difficult to forecast any practical value in or effect of an injunction restraining the defendant advertisers from broadcasting or causing to be broadcast records of plaintiff's members. The advertisers have no voice in the

selection of records to be played and exercise no control over the playing of records. It follows, then, that any such injunction would be a practical nullity; it would enjoin the defendant advertisers from doing something they were powerless to do in any event. Furthermore, if the plaintiff is entitled to relief, an injunction against the broadcasting company would protect it fully.

The claim of joint liability appears clearly unsound, without colorable grounds and, therefore, insupportable. Something other than the mere relation of advertiser and station operator must exist to support an action against the advertising defendants for violation of the plaintiff's property rights by programs broadcast by the station. I am decided that the bill states a claim solely against the Wm. Penn Broadcasting Company.

The motion therefore must be and hereby is denied.

— *Lucy K. Lord*
J.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF
PERFORMING ARTISTS BY
JAMES J. WALKER AND FRED
WARING, TRUSTEES AD LITEM

vs.

WM. PENN BROADCASTING
COMPANY, et al.

CIVIL ACTION.

FILE NO. 939.

FILED

DEC 12 1940

GEORGE ORNDORFF, Clerk
By *GWS* Dpty Clerk

Philadelphia, Pa., Monday, November 25, 1940.

SHORTHAND SERVICE BUREAU

EVERETT G. RODEBAUGH

LAW REPORTERS

PHILADELPHIA

DAN RIVKIN
220 So. 16th Street
PHILADELPHIA, PA.

Order For Advertising

N574.

March 25, 1939

To Station WPEN

Please broadcast the following, and charge to this office:

Each day except Sunday:

Once on Morning 920 Club

Three times on Afternoon 920 Club

Approximately 10 PM

-Total, 30 announcements per week-

This contract supersedes contracts N 484
and N 302

Sponsor Royal Shoe Market
Starts March 27, 1939
Expires Indefinite, cancellation by written notice.
Rate \$75.00 per week
Discounts 15% Agency


DAN RIVKIN

201

DECEMBER 27, 1939

MR. HERMAN SCHAEFFER
BAILEY'S FURNITURE CO.
635 MARKET STREET
PHILADELPHIA, PA.

DEAR MR. SCHAEFFER:

THIS IS TO CONFIRM THE CONTRACT YOU HAVE WITH
US STARTING FEBRUARY 12, 1940, FOR THE SAME
BROADCASTING YOU HAVE NOW, PLUS THE USE OF THE
ANNOUNCER ON SUNDAY, FOR TWO POLISH ANNOUNCEMENTS--
BEFORE AND AFTER THE ROSARY HOUR. THE RATE IS
TO BE \$155.00 PER WEEK.

STARTING WITH THE FIRST WEEK IN JANUARY, AND FOR
A PERIOD OF SIX WEEKS, WE ARE GIVING YOU A PACKAGE
DEAL AT THE RATE OF \$105.00 PER WEEK.

THANK YOU FOR YOUR COOPERATION, AND YOU MAY BE ASSURED
OF OUR DESIRE TO WORK WITH YOU AT ALL TIMES.

CORDIALLY,

ARTHUR SIMON, MANAGER
WM. PENN BROADCASTING CO.

AS:CS

D2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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PERFORMING ARTISTS BY
JAMES J. WALKER AND FRED
WARING, TRUSTEES AD LITEM

vs.

WM. PENN BROADCASTING
COMPANY, et al.

CIVIL ACTION.

FILE NO. 939.

FILED

DEC 12 1940

GEORGE BROUBECK, Clerk
By *G.W.* Dpty Clerk

Philadelphia, Pa., Monday, November 25, 1940.

I N D E X

HEARING ON MOTION TO REMAND

DEFENDANTS' EVIDENCE (9)

	<u>D.</u>	<u>C.</u>	<u>RD.</u>	<u>RC.</u>
Arthur Simon.....	9	25	--	--
Herman Schaeffer.....	42	43	--	--
Samuel Leavitt.....	44	45	--	--
Benedict Gimbel, Jr.	54	58	62	--

EXHIBITS:

PAGE:

Defendants' Exhibit 1 An order for advertising, dated
March 25, 1939, from Dan Rivkin, to Station WPEN...20

Defendants' Exhibit 2 Copy of letter dated December
27, 1939, to Mr. Herman Schaeffer from Arthur Simon,
Manager, Wm. Penn Broadcasting Co.....22--32

IN THE DISTRICT COURT OF THE UNITED STATES
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PERFORMING ARTISTS BY
JAMES J. WALKER AND FRED
WARING, TRUSTEES AD LITEM

CIVIL ACTION.

vs.

WM. PENN BROADCASTING
COMPANY, P. B. WHITE CO.,
INC., KEITH TAILORS, INC.,
ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG AND HERMAN
SCHAEFFER, Individually and
trading as BAILEY'S FURNITURE
CO.

FILE NO. 939.

Before HON. GUY K. BARD, J.

Philadelphia, Pa., Monday, November 25, 1940.

PRESENT: SPEISER AND SPEISER, ESQS.,
By HERBERT A. SPEISER, ESQ.,
Representing the Plaintiff.

PHILIP WERNER AMRAM, ESQ.,
Representing Wm. Penn Broadcasting
Company, P. B. White Co., Inc.,
Royal Shoe Market, Inc., and
Bailey's Furniture Co.,
Defendants.

I. JACK FEINSTEIN, ESQ.,
Representing Keith Tailors, Inc.,
A Defendant.

HEARING ON MOTION TO REMAND

MR. AMRAM: If the Court please, this matter comes up before the Court on a motion to remand the action to the State Court, the same having been removed here from Common Pleas No. 6 under the following circumstances:

The plaintiff, represented by Mr. Speiser, brought a bill in equity against the William Penn Broadcasting Company, a Delaware Corporation, operating Station WPEN in Philadelphia and four other defendants who are advertisers over Station WPEN.

Of those defendants, P. B. White Company, Incorporated, the first one named below, the defendant William Penn Broadcasting Company is a Delaware Corporation, also. The other three defendants, Keith Tailors, Inc., Royal Shoe Market, Inc., and Morris Eisenberg and Herman Schaeffer, individually and trading as Bailey's Furniture Co., all are Pennsylvania residents, individuals

or Pennsylvania corporations.

In the State Court, after the action had been filed, the defendant, William Penn Broadcasting Company, filed a motion for removal to this Court, on the ground that the plaintiff had improperly joined the Pennsylvania advertiser defendants for the purpose of preventing the removal of the action to this Court by the corporate Delaware defendant, the operator of the station, alleging in the petition that the advertisers had merely bought announcement time over the station and were in no way responsible for the contents of the musical program, which musical program was the basis of the plaintiff's bill.

The substance of the plaintiff's bill is that the defendants have violated the plaintiff's common law property right in certain musical compositions which were played as recorded programs by the defendant, Station WPEN.

In the State Court the plaintiff filed a demurrer to the petition for removal which was overruled after argument and the filing of briefs by Common Pleas No. 6, and the action removed to this Court. Following

the removal, the defendant filed an answer --

THE COURT: On what ground did the Common Pleas remove it here?

MR. AMRAM: The Common Pleas removed it on the ground the averments by the defendant in the petition for removal made a prima facie case for removal, and the petition for removal was sufficient as a matter of law, the Common Pleas Court ruling under the Federal cases that the question of a dispute over the facts as to the verity of the averments in the petition for removal could not be litigated in the State Court but only in the Federal Court on a motion to remand after removal, which is undoubtedly the law.

THE COURT: Was there any dispute as to the facts?

MR. AMRAM: There was no dispute as to the facts in the State Court because the plaintiff can't dispute the facts in the State Court. Now that we are here in the Federal Court, I take it, Mr. Speiser by filing an answer to the petition and his motion to remand, and by reason of his averments, is contradicting certain of the facts in the petition, which requires this hearing so that the Court may determine whether

or not the facts in the petition for removal are true, because I take it if the facts are not true the Court has the power to order a remand if it wishes, so that the purpose of this hearing in which we, as defendants, are the moving parties is to establish the truth of the averments in the petition for removal.

THE COURT: Will this take very long?

MR. AMRAM: It may take a couple of hours, yes.

THE COURT: All right, go ahead.

Do you wish to say anything at this time?

MR. SPEISER: No.

MR. AMRAM: I might briefly state to the Court what the issue is.

THE COURT: All right.

MR. AMRAM: The issue now before the Court is a determination of the relationship of the defendant advertisers to the defendant station and to the programs, the record, the recorded music which was played on programs which preceded or followed the announcement of the defendant advertisers' business advertisement. All that they did, according to all the facts, is to purchase from the station enough time to

have 50 or 100 words read over the station's facilities.

THE COURT: I take it, then, from what you say, that you want the hearing because you say that the William Penn Broadcasting Company is the only indispensable defendant, that the others are not indispensable, and, therefore, since this is a Delaware corporation, it belongs here.

MR. AMRAM: It is not a question of indispensability. The other defendants are not defendants at all, because they are not involved in the action.

THE COURT: Mr. Speiser, I suppose, says they are indispensable defendants here, and because some of them are Pennsylvania citizens or corporations, that it belongs back in the State Court, is that it?

MR. SPEISER: As I understand the issues, sir, so long as there is any semblance of liability on the part of the defendants, if they are possibly defendants who are liable, as a matter of law, they are properly joined as defendants. The basis of the petition for removal must be that they were fraudulently joined, as it so avers, for the purpose of preventing the removal. They can be fraudulently joined only if it could be proven that that was the avowed purpose,

and that there was no possible legal liability on them in this case.

THE COURT: All right.

MR. AMRAM: I might state to the Court I represent William Penn Broadcasting Company, the Bailey Furniture Company, P. B. White Company, and the Royal Shoe Market, Incorporated. Mr. I. J. Feinstein, who is also here, represents the Keith Tailors, Incorporated, of record, but has agreed that I may handle the case for his client, as well.

THE COURT: All right.

MR. SPEISER: May it please the Court, this may facilitate matters, I don't know whether Mr. Amram is agreed, but as I understand it, in proceedings of this kind upon a motion to remand, it is not the province of the Court to try the merits of the case, and that under the decisions, so long as the bill in equity which represents the only pleading in the case sets forth the cause of action properly, though there may be some doubt -- and when I say doubt, I mean legal doubt -- as to the liability, that would not suffice to command a removal.

In other words, and simply generally put, the doubtful questions of law are not to be tried upon a motion to remand, but they are properly triable in the court which has jurisdiction of the case which, in this particular case, was the Common Pleas Court in Philadelphia.

I say that now only because I shall necessarily object to any evidence which will be attempted to be admitted here going to the merits of the cause, and, as I take it, the only issue here to be ascertained, is whether or not there is absolutely no semblance of right in these defendants so that their names in the bill as defendants are purely and simply without foundation, and so restrict the hearing at this time to that issue.

THE COURT: I can't see why you two gentlemen can't agree to stipulate the facts here.

MR. SPEISER: It isn't possible for me to agree, sir, because it is predicated upon contracts between the station and the two advertisers. I had no knowledge of them, I have never seen them, and in the State Court, as Mr. Amram has said, the issue of fact did not exist in the sense that the State Court had no jurisdiction.

THE COURT: All right.

DEFENDANTS' EVIDENCE

ARTHUR SIMON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AMRAM:

Q Your address, Mr. Simon?

A Bennett Hall Apartments.

Q And your business address?

A 1528 Walnut Street.

Q With whom are you connected?

A William Penn Broadcasting Company.

Q In what capacity?

A General manager.

Q How long have you been general manager?

A Two and a half years.

Q Were you general manager at the time that the contracts with Keith Tailors, Incorporated, Royal Shoe Market, Incorporated, and Bailey's Furniture Company were made?

A I was.

MR. AMRAM: If the Court please, as far as the P. B. White Company contract is concerned, that, I think, Mr. Speiser will agree, is irrelevant in view of the fact that they are a Delaware corporation, and, therefore, would have a right to removal if they were alone, and I am not going to waste the time of the Court by going into an analysis of that company's contract, because that is irrelevant on this issue.

THE COURT: All right.

BY MR. AMRAM:

Q Mr. Simon, how long have you been in the broadcasting business?

A Close to 14 years.

Q Will you be good enough to state for the Court the history of your experience in that business?

A Well,--

MR. AMRAM: If the Court please, this will become relevant.

THE WITNESS: -- originally, I represented the New York office for the European representative of the Metropolitan Opera House, and after that I became publicity man for a great number of radio artists such as Ferdie Groffe, Nat Shilkret, The Pickens Sisters, George Earle, Leonard Joy, and many others.

Following that I published my own radio book called "Who's Who in Radio," I believe the first publication of its kind, and after that I joined an advertising agency; I was with them for a number of years, left there to go to the Coast with another advertising agency on the Coast, in both agencies as radio director.

Following that I joined the National Broadcasting Company, was with them a while, I left there to join another agency, and then became associated with the radio publication; following that, came to Philadelphia as manager for the radio station.

Q And you have been with WPEN for the last two and a half years?

A That is correct.

Q Mr. Simon, are you familiar with the various types of programs which are available to advertisers, not only on Station WPEN, but generally on radio stations throughout the country?

A Yes.

Q Will you describe to the Court the various types of programs and the nature and distinctions between the various types of programs?

A Well, an advertiser might purchase a spot announcement on a radio station; they might buy a program of

five minutes' duration, ten minutes' duration, fifteen minutes', half an hour, three-quarters of an hour in some cases, or an hour. Those programs may be participating programs, or they may be what we call strips across the board that they control after they have purchased them. In some cases they furnish their own talent, and in some cases the station furnishes the talent. In most cases, especially on networks, they are controlled by advertising agencies; that is, they buy the time, they run the program.

Q The advertising agency runs the program?

A That is correct.

Q In those cases who does the advertising agency represent?

A The advertising agency represents the client.

Q What do you mean by a spot announcement?

A An announcement that can be purchased in possibly thirty seconds, a thirty-word announcement or a fifty-word announcement to a one hundred word-announcement. That is similar, if I might demonstrate, to an Ex Lax announcement calling attention to the quality of the product.

Q When is that announcement broadcast?

A It all depends. You might buy a spot announcement

on a particular program, preceding or following a particular program, or you might buy that announcement on a participating show with many others.

Q What is a participating show?

A A participating show -- rather, I would say a participating program would be a program where there would be many announcements with recordings in between them, musical selections.

Q Of the various types of advertising that you have mentioned, in which of those programs, if any, does the advertiser or the sponsor control ^{in whole} /or in part the program part of the material other than his advertising material?

A I would say in a program where -- I might demonstrate that best by saying a program such as Jack Benny's, where the time is purchased by the advertising agency, and the client, the advertising agency has charge of that program and they regulate the program. The only things they have to conform with are the regulations of the station, conformity of the program.

Q With respect to an announcement program that was mentioned, what control does the advertiser have over that?

A They have no control.

Q Where does the advertising material come on, let

us say, a half an hour between certain times of the day in the course of which an announcement is to be spoken by the station? What is it that the advertiser buys?

A That continuity would either come from the client direct or from the agency that represents the client in some cases --

Q When you say continuity, what do you mean by that?

A The script for the program, that is the 100-word announcement, or the 50-word announcement, or whatever the announcement is.

Q How about the stuff that the listener hears before those words are spoken or after those words are spoken?

A That comes from the station direct.

Q What control does the advertiser have over that?

A Absolutely none.

Q Does it make any difference what kind of an announcement program the advertiser buys with respect to his control over this material that comes before or after his 100 words?

A No, he has no control of that. He might buy a spot announcement on a particular program during the course of a day; he might specify the time he would like to be on, let us say between -- he might want to buy a period of time or a spot announcement some time between

two and four o'clock in the afternoon. He would have nothing to do with the program, but his announcement would be made some time between two and four. One day it might be 2:30, the next day it might be at 3:40.

Q Then do I understand that you distinguish between the word program and the word announcement?

A I do.

Q What is the distinction, generally speaking?

A Well, when he buys an announcement on a participating show the advertiser has no control whatsoever over the time that the announcement will be on. On the other hand, when they buy the program, they might buy a program at two o'clock right across the board for fifteen minutes, five minutes, or ten minutes, in that case they do have control. They know at 2:05 to 2:10, or at 1:00 o'clock to 1:30 every day their program will be on.

BY THE COURT:

Q What was the situation with respect to these defendants?

A They had no control.

MR. SPEISER: I object to that, if the Court please.

BY MR. AMRAM:

Q Now, Mr. Simon, do you feel that from your experience

and your knowledge of the radio business that you are able to state whether or not there is a general custom in the radio industry throughout the United States with respect to the general types of programs which you have mentioned, and also with respect to advertiser control over announcement programs?

A I don't get your question, I am sorry.

Q I am sorry, it is probably too long. I will rephrase it, Mr. Simon. Do you feel you are able to state from your experience in the radio business that there is any regular custom in the radio industry with respect to advertiser control over the programs that precede and follow an announcement of an advertiser?

A Yes.

Q And what is that custom?

A Well, when it comes to participating shows and spot announcements, we just sell a spot announcement, and I believe that is customary throughout the industry. We sell an announcement, we bill the show. We might have a show, a participating show of fifteen minutes, and it may run two hours, it might run longer; it might run all night. There may be one client, or there may be fifty, it all depends on what we are selling.

On the other hand, when we sell a program

for a certain product such as Ivory, or Oxydol, or Camay, or Jello, and it is bought by the agency for a particular time, maybe once a week, maybe twice a week, or maybe six times a week, they will buy a particular strip of time. When they buy an announcement on a participating show they have absolutely no control of that music or whatever goes on that program.

Q Mr. Simon, is that true only with respect to Station WPEN, or is that universal throughout the industry?

A No, that is universal throughout the industry.

Q You take up the case of the three customers who are joint defendants in this bill. It is averred in the plaintiff's bill that on a certain day in January, certain days in January, 1940, that this station broadcast four phonograph records which are named in the bill in paragraph 13, and at the same time the defendants, Keith Tailors, Inc., Royal Shoe Market, Inc., and Bailey's Furniture Company, were, to use the language of the bill, co-venturers with you in broadcasting those records. Will you inform the Court of your own knowledge, the nature of the contracts which you had at that time with those advertisers?

MR. SPEISER: If the Court please, I should

think if we had the contracts in evidence, at least, it would be a good beginning, instead of explaining them before we see what they are. I haven't objected up to now, although I think all of this is more or less irrelevant. I don't want to try the issue of liability in these proceedings, it has no part in these proceedings. As I see it, what we are trying here this morning is only whether or not these defendants were fraudulently added as parties defendant, and they can only have been fraudulently added if there is absolutely nothing, no colorable ground for their liability.

MR. AMRAM: Right.

MR. SPEISER: That may be proven at the trial, but if there is colorable ground as alleged in the bill, the issues are not triable in the remand proceeding. Custom and all that sort of thing which we are now establishing --

THE COURT: I will overrule the objection. I will take it into consideration when I read it.

BY MR. AMRAM:

Q I believe you were asked, Mr. Simon, whether you were familiar of your own knowledge with the nature of the contracts of those three advertisers.

A Yes, I was.

Q Will you state to the Court what the nature of those contracts was, from your own knowledge?

A In all three instances, in the case of P. B. White--

Q No, leaving out P. B. White.

A In these three cases they simply bought spot announcements.

Q What was the nature of those spot announcements?

A They were spot announcements that could be used on any participating show; they spot a spot somewhere between certain times on which we had certain participating musical programs. I believe two of them were on what we call our 9920 Club. It derives the name 9920 Club from our wave length on which we operate; and the other one was on a program, I believe, called Swingtime Review.

Q Mr. Simon, I show you an order for advertising on the letterhead of Dan Rivkin, dated March 25, 1939, for the Royal Shoe Market, and ask you if you will identify this contract?

A Very well.

Q What is this?

A This is the order from the agency for spot announcements for the Royal Shoe Company on two particular participating shows, one in the morning and one in the

afternoon.

Q Where did this particular original paper come from?

A From the advertising agency.

Q Was it produced from your files?

A That's right.

Q Did you at that time have any other contract with the Royal Shoe Market for advertising, or for the use of your station facilities except this contract?

A No.

MR. AMRAM: I ask that this be marked Defendants' Exhibit No. 1, and offer the same in evidence.

(An order for advertising, dated March 25, 1939, from Dan Rivkin, to Station WPEN, was marked Exhibit D-1. A copy thereof follows:

"DAN RIVKIN

220 So. 16th Street

PHILADELPHIA, PA.

ORDER FOR ADVERTISING N574.

March 25, 1939

To Station WPEN

Please broadcast the following, and charge to this office:

Each day except Sunday:

Once on Morning 920 Club

Three times on Afternoon 920 Club

Approximately 10 PM

- Total, 30 announcements per week-

This contract supersedes contracts N 484

and N 302

Sponsor	Royal Shoe Market
Starts	March 27, 1939
Expires	Indefinite, cancellation by written notice.
Rate	\$75.00 per week
Discounts	15% Agency

/s/ Dan Rivkin

DAN RIVKIN")

BY MR. AMRAM:

Q I show you a copy of a letter from your files written by you to Mr. Herman Schaeffer, of Bailey's Furniture Company, dated December 27, 1939, and ask you if you can identify that copy.

MR. AMRAM: If the Court please, while Mr. Schaeffer is here and will testify that the original of that contract was in his possession, he cannot locate it, although he tried to do so in advance of the hearing. In other words, this is technically inadmissible with

the follow-up procedure, but there is no jury, so I assume it is all right if I do it that way.

THE WITNESS: That is correct.

BY MR. AMRAM:

Q Mr. Simon, is this, so far as you know, the only document between yourself and Bailey's Furniture Company with regard to their advertising at that time?

A It is.

Q What is the nature of that advertising?

A They bought a package deal of certain announcements at a certain price.

(Copy of letter dated December 27, 1939, to Mr. Herman Schaeffer from Arthur Simon, Manager, Wm. Penn Broadcasting Co., was marked Exhibit D-2.)

BY MR. AMRAM:

Q What was the nature of the contract with the Keith Tailors, Inc.?

A It was also for spot announcements on the Swingtime Review, a musical show we have in the evenings between 9:30 and 10:00 o'clock.

Q Mr. Simon, is there any national trade publication in the radio industry which furnishes the type of program material, and also the advertising data for the trade?

MR. SPEISER: May it please the Court, I object.

THE COURT: Well, we will let him answer. I will overrule the objection.

THE WITNESS: When you say the type of program material, I don't know what you mean by that.

BY MR. AMRAM:

Q The rates and data for various advertising programs that are available for program material.

A Yes, there is one publication.

Q What is that publication called?

A Standard Rate and Data.

Q Does your material appear in this publication?

A It does.

Q And so far as you know, the publications of practically all other stations in the United States and Canada?

A I believe all of them.

MR. AMRAM: If the Court please, this publication is extraordinarily bulky, it is over 300 pages, and it has in it a breakdown of advertising material of every station in the United States and Canada,, giving the advertising rates which they charge advertisers for the various types of programs that they put on. What I propose to show here is that it is a uniform custom

throughout the United States for stations to advertise or solicit advertisements on rate cards, which rate cards publish the rate for a fraction of an hour down to five minutes, which is the smallest, and then they separate advertising announcements anywhere from twenty-five words to one hundred words as an entirely separate type of program, which is a facility that they offer to their prospective customers. I can do that by going into this book, which would take hours, and I wonder whether or not Mr. Speiser would be willing to save the time of the Court by stipulating the fact that in this publication, which is the official publication of the industry, that those facts appear.

MR. SPEISER: That some stations offer spot programs?

MR. AMRAM: No, that over ninety-nine per cent of all the stations in the United States and Canada in this standard publication furnish rates for advertising on a program basis and on an announcement basis, with the latter entirely separate and distinct from the program advertising data and rates.

MR. SPEISER: I will admit it without the qualification of being entirely separate and distinct. I don't know what is intended by that. The kind of

service offered by radio is the service whereby they will permit merely verbal announcements of so many words on a product, I grant that. I don't grant any qualification that it is separate and distinct any more than any other program is separate and distinct.

MR. AMRAM: I didn't say that. All I said was in furnishing the material for publication in this standard rate book for circulation among the entire trade which would buy the facilities of the stations, the stations in quoting their station's rates quote separately their program rates for programs and their announcement rates for announcements. If Mr. Speiser would like to look at the book, I have it broken down for each station in this country and Canada.

MR. SPEISER: That may be true because a program consumes a specified time, perhaps a fifteen-minute period, whereas a verbal spot announcement may only last a minute or a half a minute.

MR. AMRAM: I think with that stipulation it is adequate for our purpose.

Cross-examine.

CROSS-EXAMINATION

BY MR. SPEISER:

Q Mr. Simon, suppose we start with these papers which

you offered. In this paper which you say is the only contract between the station and the Royal Shoe Market, it appears to be an ordinary blank form of the advertising agency, addressed to WPEN. Are you familiar with it?

A Yes.

Q That is the only contract?

A That is correct.

Q You don't have form contracts of WPEN for this sort of thing?

A We have form contracts, but when we get one from an agency --

Q None was executed in this case?

A No. In most of our cases we don't execute them.

Q The order reads:

"Please broadcast the following, and
charge to this office:

Each day except Sunday:

Once on Morning 920 Club."

What does that mean?

A That is the program we have called the 920 Club.

Q What is the nature of the program?

A It is a musical program; it runs from 10:00 to
11:00 o'clock five days a week.

Q Consisting of what?

A Consisting of musical selections.

Q Of what nature?

A Popular recordings.

Q Popular recordings, phonograph records?

A Yes.

Q Not electrical transcription?

A That is correct.

Q Now, the contract goes on to say:

"Three times on Afternoon 920 Club."

A Same type of program, running an hour and three-quarters.

Q Phonograph records?

A Musical selections.

Q It also reads:

"This contract supersedes contracts N 484
and N 302."

Do you know what that refers to?

A Yes, his previous orders when this contract resumed, that is, it was a continuation of the other contract we had, and also another contract we had before that.

Q From the Royal Shoe Market?

A That's right.

Q Through the same advertising agency?

A That's right. Every thirteen weeks we will get a new one.

Q Are these contracts similar in nature?

A Yes.

Q Did they specify the announcement to be made on the 920 Club?

A That is correct.

Q On the morning program of phonograph records?

A It doesn't say phonograph records.

Q That is what it is; you as the station manager know that the 920 Club consists of phonograph records?

A Correct.

Q Does it specify the afternoon 920 Club?

A Yes.

Q How far back does that go, Mr. Simon?

A This particular contract?

Q And the prior ones which this renewed.

A They don't all say the same; the same client, eight years, I would say.

Q The particular client, about eight years; accordingly, then, Mr. Simon, as to this particular advertiser, the Royal Shoe Market, they were quite specific not only as to the time that they desired their announcement to be made, but also as to the program during which they

wanted it to be made?

A That is correct.

Q And that was the phonograph program?

A Correct.

Q You don't have any doubt in your mind that they knew what the 920 Club was when they wrote it on their order?

MR. AMRAM: Objected to. The witnesses are all here.

MR. SPEISER: Very good.

BY MR. SPEISER:

Q Now, let's turn here to the Bailey's Furniture Company contract. You have nothing in prior records of the station pertaining to the contract with this company?

A That is correct.

Q And this is a copy of a letter that you addressed to them?

A Correct.

Q Dated December 27, 1939?

A Correct.

Q In which you say, "This is to confirm the contract you have with us"?

A Yes.

Q What is the contract, and where is it?

A There was no contract drawn up at all; it was an

understanding I had with Mr. Schaeffer, who is here, for a particular number of announcements at a particular time.

Q Was it a verbal contract?

A That's right. That was verified by this letter. It was put on the air, and he gets his bills. It is what we call a package deal.

Q This letter specifies that the announcement for the advertiser was to be paid -- or, let me put it this way: this letter specifies that the entertainment feature in connection with this commercial was two Polish programs or Polish announcements?

A No, it simply says, if you read that letter correctly, that it confirms a certain contract, and also some announcements, I believe, on a Polish program.

Q In other words, there were two separate --

A Two particular announcements on a particular program.

Q That is not clear to me. Will you read it and then tell me exactly what it does mean?

A Yes.

"This is to confirm the contract you have with us starting February 12, 1940, for the same broadcasting you have now --"

Q Let me stop you there. Does that refer to one

specific kind of program?

A That's right, that is the understanding.

" -- plus the use of the announcer on Sunday, for two Polish announcements..." to be made "before and after a particular program called the Rosary Hour.

Q That is completely separate from the first part of the sentence?

A Yes, it is written badly.

Q The first part of the sentence refers to a verbal contract you had with this company?

A Yes, sir.

Q Was this the first time they went on your station?

A No.

Q Was there any written contract with them prior to this?

A No.

Q Always verbal?

A Yes, it was closed in his store verbally.

MR. AMRAM: If the Court please, I don't believe I offered the second document in evidence as a defendants' exhibit, according to my recollection. With the Court's permission, I will do that now.

THE COURT: All right.

(A copy of Exhibit D-2 follows:

"December 27, 1939

Mr. Herman Schaeffer
Bailey's Furniture Co.
635 Market Street
Philadelphia, Pa.

Dear Mr. Schaeffer:

This is to confirm the contract you have with us starting February 12, 1940, for the same broadcasting you have now, plus the use of the announcer on Sunday, for two Polish announcements -- before and after the Rosary Hour. The rate is to be \$155.00 per week.

Starting with the first week in January, and for a period of six weeks, we are giving you a package deal at the rate of \$105.00 per week.

Thank you for your cooperation, and you may be assured of our desire to work with you at all times.

Cordially,

Arthur Simon, Manager

WM. PENN BROADCASTING CO.

AS:CS")

BY MR. SPEISER:

Q The third advertiser, Keith Tailors, is that a verbal contract, too?

A No.

Q In writing? Do you have a copy of it?

A Have I a copy of it? I believe we have.

Q May I see it?

A I haven't got it; I believe there was a contract.

MR. AMRAM: I don't have it, Mr. Speiser.

THE WITNESS: Mr. Dinat is here; I am pretty sure there was a contract.

BY MR. SPEISER:

Q Did you make all these contracts, Mr. Simon?

A No, sir, I did not.

Q Did you make any of them?

A Yes, this one.

Q Which one?

A This last one.

Q Bailey's Furniture?

A That's correct.

Q What was the verbal contract?

A That was for a number of spot announcements at a certain price.

Q Was it also specified or understood that it was to

be on a club, the 920 Club?

A No, sir.

Q Nothing at all?

A Nothing at all.

Q Did you have any discussion at all with the person representing Bailey's Furniture as to where or what the nature of the entertainment would be when you were selling the announcement?

A No, sir. They were twenty-five-word announcements and we were to place them like we want.

Q They had no interest where they were to be put?

A None whatsoever. It was sold with that understanding.

Q In so far as the radio business is concerned, Mr. Simon, I suppose the most flexible type of business you do is spot announcement?

A That is correct.

Q You attempt to fit it in wherever it is most convenient to the station?

A Yes.

Q Unless your advertiser insists upon something else?

A That is correct.

Q You wouldn't say there is any general custom about spot announcements except that it is the lowest type of

advertising, and it is for that very reason utilized by the station as it can be best used?

THE COURT: You mean by that the cost is less than any other?

MR. SPEISER: Yes.

THE WITNESS: Yes.

BY MR. SPEISER: It has nothing to do with the merits, if Your Honor pleases.

THE COURT: All right.

BY MR. SPEISER:

Q And the station fits them in depending on the extent and nature of its business?

A Yes.

Q As a matter of fact, there couldn't be a general policy throughout all of the stations of the country except that?

A I believe so.

MR. SPEISER: That is all.

THE COURT: The thing you are complaining of is the music that is rendered before and after the spot announcements, isn't that right?

MR. SPEISER: That is right.

THE COURT: How do these spot announcements have any more connection with the music than a separate

program would have?

MR. SPEISER: I don't maintain that they have any more; I maintain they have just as much. In other words, the case --

THE COURT: They have just as much and just as little in that connection?

MR. SPEISER: No. In the ordinary program, as has been explained to Your Honor, the theory is that the advertiser has the control in the sense that he specifies the nature of the entertainment that he wants in connection with his program. He says either an orchestra --

THE COURT: Say from 9:30 to 10:00 o'clock we have a separate program, then at 10:00 o'clock we start this music of which you are complaining, and then at 10:05 we have a spot announcement. How does the spot announcement have any more connection with that music that was rendered between 10:00 and 10:05 than does the program which was rendered at 9:30 to 10:00?

MR. SPEISER: The advertiser, sir, as has been illustrated by the one contract which was offered into evidence, says that he wants his commercial announcement to be made during the course of a certain program. He specifies that program because he thinks that has

an entertainment feature of value which attracts a large audience, and that he will have by reason of its value, a large listening audience when that program goes on, and that is the time he wants his commercial to be announced. Therefore, he puts in writing that this is to be on the 920 Club, which has been defined by the station manager as a specific program of phonograph records running for a certain number of hours. Likewise, in the afternoon it is similar; it is the desire of the advertiser to be there because he feels the entertainment feature --

THE COURT: Does he specify which phonograph records?

MR. SPEISER: No, he does not.

THE COURT: Is that left entirely to the discretion of the radio broadcasting company?

MR. SPEISER: So far as the contract is concerned, I have no knowledge that he ever specifies the records, and I would say honestly to Your Honor that he does not, in point of fact, although the ultimate decision rests with the station as to what records be played, they will always accede to the request of anybody who writes in, and these programs, if I may go out of the record for a moment, have gathered popularity

because of a very important feature which permits people to write in to the station and say, "Won't you please play this record which I like?" And I say this as a pure guess, but I would feel sure that on each one of these programs perhaps fifty per cent of the records played are requests from outsiders.

MR. AMRAM: Not from advertisers.

MR. SPEISER: Not from advertisers.

THE COURT: What control does the advertiser have over that?

MR. SPEISER: I don't think the advertiser has any control over the program at all, in that sense of selecting the records, unless he might verbally --

THE COURT: I take it from your remarks that he wants it on a certain program because he thinks that there will be a big audience?

MR. SPEISER: Yes.

THE COURT: Supposing somebody from the public writes in and they want a certain song, and the broadcasting company puts it on, and yet it is a song that is very repugnant to the tastes of the public at large, and they all dial off their program then; how did the advertiser have anything to do with getting it on the program?

MR. SPEISER: I don't think he had.

THE COURT: You say the advertiser wants that program because he thinks that is a popular program.

MR. SPEISER: Yes, they know a program which has been on the air, we will say, a great number of years, has a certain quality about it, it is a program consisting of a certain type of music; it may be popular dance music, it may be classical, it may be light operatic, they acquire a reputation because they are consistent.

I think Mr. Simon will testify to Your Honor that the 920 Club is a program of a certain kind, and it is that kind every day in the week. It doesn't play opera one morning, on Monday, and jazz on Wednesday, and light comedy music on Thursday, but it plays whatever it may be, a certain type of entertainment continuously ever day.

THE COURT: I have been in public places already and I have heard people say, "Oh, I am getting so sick and tired of hearing that song coming over. It is going day after day." Last summer it was the Beer Barrel Polka, and they would turn it off. The advertiser has no control over that, the spot advertiser?

MR. SPEISER: That's right.

THE COURT: On that very thing, I am just trying to see his connection with the music of which you are probably justly complaining that they have no right to play, but I don't quite see the advertisers' connection. When I say that I don't want you to understand I am deciding this matter, I am just groping for information.

MR. SPEISER: I understand. I cannot answer it any better than to say the program has a decided reputation of being of a certain nature.

THE COURT: All right.

MR. SPEISER: It is comedy, it is dramatic, it is classical, it is popular, and the advertiser says, "I think my product is best popularized by an audience listening to this kind of music."

THE COURT: If they are using your music, I think you have a very just complaint against the broadcasting company, if that is the fact. I don't quite see, under the evidence so far -- of course, there may be other facts -- how you can complain that the advertisers have done anything wrong.

MR. SPEISER: Only as is set forth in the bill in equity and as I hope to argue.

THE COURT: All right, go ahead.

MR. AMRAM: If the Court please, I simply would like to say in further amplification of Your Honor's thought, it is our position that if the position of the plaintiff is correct, then if an advertiser would buy the station break announcement at 7:30 in the evening just after Jack Benny's program, which happens to be the most popular program on the air today, from the National Broadcasting Company's network on the station break between 7:30 and 7:31, he would have his spot announcement time in there because he would know he has the biggest audience of any program on the air.

On the theory of Mr. Speiser, that announcer would be also responsible for the content of Jack Benny's program which had preceded because he had definitely ascertained when that time comes there would be a large listening audience. In other words, I pass that out in further application of Your Honor's thought in the matter.

MR. SPEISER: Of course, the immediate discussion is not on Jack Benny's program. He is advertising, in this case, on a program which he specifically specifies and says, "We want to be on the program."

THE COURT: All right, proceed.

MR. SPEISER: I have no further questions.

HERMAN SCHAEFFER, having been duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AMRAM:

Q Mr. Schaeffer, you are a partner in the Bailey's
Furniture Company?

A I am.

Q Mr. Schaeffer, I show you Defendants' Exhibit No.
2, which is WPEN's carbon copy of a letter from Mr.
Simon to you, dated December 27, 1939, confirming the
contract that he made with you for announcements at
that time.

A Yes.

Q Are you familiar with the contents of that?

A I believe I am.

Q Did you make a search for the original in your files
at my request?

A I did on two different occasions.

Q Were you able to locate it?

A No.

Q Would you read over that letter and state to the

Court whether you are in a position to state at the present time that that letter is a copy of the original which you received at that time?

A It is. This is the second or third contract of this type that I have made with Mr. Simon.

Q What was the nature of the deal that you were buying?

A I bought a package deal, as Mr. Simon called it, of spot announcements. One day I would be behind a cooking school, the following day would be music, the third day would be about Rinso, or something else, and the fourth day would probably be a record.

Q That was the nature of your contract?

A I had spots at no specific time.

MR. AMRAM: Cross-examine.

CROSS-EXAMINATION

BY MR. SPEISER:

Q Mr. Simon suggested your contract was verbal.

A It started as a verbal contract.

Q What did you mean when you said you looked two or three times to find it?

A You see, this was a copy of a letter that Mr. Simon had sent to me. I looked for the original letter.

Q You had no knowledge of what program your spot came

on?

A No.

MR. SPEISER: That is all.

SAMUEL LEAVITT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AMRAM:

Q Mr. Leavitt, you are connected with Keith Tailors, Incorporated?

A That's right.

Q Did you make a deal with WPEN for time?

A That's right.

Q What did you buy?

A I bought spots.

Q At what time?

A Between 9:30 and 10:00.

Q How many days a week?

A Six days.

Q Is that all you bought?

A That is all.

MR. AMRAM: Cross-examine.

THE WITNESS: 9:30 and 10:00 o'clock in the morning and evening.

CROSS-EXAMINATION

BY MR. SPEISER:

Q Why did you buy 9:30 and 10:00 o'clock in the morning and evening?

A I thought it was the best spots available, you know, one of those low programs, something that I could advertise on a low program. It is the remark you made, it is cheap, a three dollar spot.

Q What is a low program?

A Low priced.

Q 9:30 and 10:00 at night is the cheapest price you could buy?

A That I could buy.

Q You know that is not true?

A Yes, it is true.

Q Cheaper than 9:30 to 10:00 in the morning?

A I don't care about the morning; I was interested in the evening program.

Q Why did you pick 9:30 to 10:00?

A It was a spot I thought was best for my business.

Q For what reason?

A I deal with the working man, and I think when he comes home, after he is through dinner he listens to the evening program.

Q Were you familiar with what went on the air between 9:30 and 10:00 o'clock over WPEN?

A Well, the deal I went into was any kind of entertainment, no special entertainment.

Q Were you familiar with what had been on that station between those times?

A He had dance music.

Q Isn't it a fact that they always had dance music, to your knowledge, between 9:30 and 10:00 o'clock at night, for the last two years, Mr. Leavitt?

A I don't think so.

Q What else did they ever have?

A Well, I believe they had sketches.

Q Between 9:30 and 10:00 o'clock at night?

A What I am trying to bring out --

Q No --

THE COURT: Just answer the question.

BY MR. SPEISER:

Q Did you ever hear any other program besides phonograph records on WPEN between 9:30 and 10:00 o'clock?

A I can't remember.

Q You can't remember?

A I didn't listen in every evening.

Q As a matter of fact, isn't that why you picked out

that time?

A Yes, it was a popular price, that is the reason I took it.

Q I am not talking about the price; I am talking about the entertainment.

A Repeat that question.

Q Isn't it true you picked 9:30 to 10:00 o'clock at night because you wanted to be on that dance program, that musical program?

A Yes, but I could have a musical program between six and seven, too, but the reason I picked between 9:30 and 10:00, I wanted to reach business people.

Q With the musical?

A That's right.

MR. SPEISER: That is all.

THE COURT: He is talking about price and you are talking about type. I think you both mean time.

MR. SPEISER: I think the witness agreed, the point being probably the price between six and eight in the evening is more expensive than after eight o'clock, and he took 9:30 to 10:00 because it is cheaper.

THE COURT: He says price, you say type. I think you are both in agreement on time. You bought it and wanted it at 9:30 to 10:00.

MR. SPEISER: If I understood him correctly -- I haven't, possibly, asked him this question:

BY MR. SPEISER:

Q You picked 9:30 to 10:00 o'clock, first, because it is cheaper for you than earlier in the evening?

A That's right.

Q Didn't you also pick 9:30 to 10:00 o'clock because you wanted to be on a musical program?

A That's right.

MR. SPEISER: That is what I thought he said before.

THE COURT: Yes, I know what he said and I know what you said, but, after all, it was because of the price and because it was music that you wanted it from 9:30 to 10:00 o'clock.

THE WITNESS: That's right.

THE COURT: The time governed the thing.

MR. SPEISER: That is all.

MR. AMRAM: If the Court please, I have here as witnesses Mr. Benedict G. Gimbel, Jr., president of Station WIP, and Mr. David Werman, of the Feigenbaum Agency, which is one of the largest independent buyers of radio time in the eastern part of the United States,

both of whom I will qualify as witnesses for the purpose of corroborating Mr. Simon with respect to the various types of radio programs and with respect to the various methods by which practically all the stations in the United States and Canada break up their programs and sell their time, and also to testify with respect to the universal custom in the radio industry of no advertiser control over the programs which immediately precede and follow announcements of various types, no matter what type of announcement they may be. I would like to know whether Mr. Speiser wants to stipulate that or whether he wants me to go ahead and examine the witnesses.

MR. SPEISER: I would be very happy to stipulate all of it with this qualification, and that is in a great many instances, just as we have had exhibited here this morning, the advertiser designates the program during which he wants his announcement to be made.

THE COURT: I haven't heard yet any evidence that he designates the program; I have heard he designates the time.

MR. SPEISER: May it please the Court, Defendants' Exhibit 1 is a contract in writing which was testified to by Mr. Simon --

THE COURT: That letter just indicated the

time of the program. He wants to call these gentlemen to prove that the advertiser has no control over the program. You say you agree to that with this qualification; then you are not agreeing to it.

MR. SPEISER: I can't agree with everything that had preceded, and he made quite a few statements.

THE COURT: You are qualifying the only thing I think important. If the advertiser has a right to dictate what that program is, then I think you may have a good case. If he doesn't, then my present thought is, I doubt whether --

MR. SPEISER: Perhaps Your Honor is being more specific than I am. I don't desire to be any more specific than was evidenced here this morning. I don't intend to convey the thought that the advertiser directs the station to play "A" record or "B" record, or "C" record. What I intended to imply was nothing more than has appeared from the witness stand, and that is, the advertiser says he wanted to be on this program, as Mr. Simon testified -- one of the witnesses testified he wanted it on the 920 program.

THE COURT: That is time, isn't it?

MR. SPEISER: No, I am sorry, Your Honor

misunderstood. The statement there wasn't time, it was the designation of a program.

THE COURT: It was music that was to be given at certain hours.

MR. SPEISER: That's right. Now, that is the only qualification I want.

THE COURT: You always seem not to give the full picture.

MR. SPEISER: May it please the Court, 920 may have confused Your Honor. It did not mean at 9:20 in the morning.

THE COURT: No, he said from 10:00 until 11:00 o'clock.

MR. SPEISER: Yes.

THE COURT: And he had it in the afternoon.

MR. SPEISER: It is specified in the contract as a specific program, Your Honor, which is of a certain type.

THE COURT: A musical program.

MR. SPEISER: That's right, of a certain type.

THE COURT: But that the advertiser has no control over the particular records to be played.

MR. SPEISER: Exactly right, sir. If I

may qualify it --

THE COURT: Go ahead.

MR. SPEISER: -- with the gentlemen's understanding that he will not change the tenor of the program. In other words, a program has a reputation of playing modern jazz records; the advertiser says, "I want to be on that". I don't think the station could the following morning put operatic arias on that program because he knows that the advertiser being familiar with the nature of the program, that is why he wants to be there.

THE COURT: All right.

MR. SPEISER: To that extent, and I think we are verified by having in this very case an illustration of it, I am willing to concede.

MR. AMRAM: I am quite satisfied that both Mr. Gimbel and Mr. Werman, if cross-examined, would state that although the station has no legal responsibility or liability to maintain the same type of program during the particular period of time in which the announcements will be interspersed, that the customer would undoubtedly, when his contract was over, decline to reinstate his contract if he didn't like what the station had been

putting on during that time, during the period that his contract ran, but I would certainly not admit that the advertiser would have any right to complain in the sense that he would have any right to compel the station to come back to playing the same type of musical program which they had been playing, let us say, during the previous six months. If Mr. Speiser is willing to stipulate that, I don't need these witnesses.

THE COURT: I think both of you have made your positions very clear. As I take it, it is your contention that while the broadcasting station would probably try to put on dance music if that was the understanding, yet there is no legal compulsion to do so. Mr. Speiser claims that is part of the contract, is that it?

MR. SPEISER: No, I don't say there is any legal compulsion in the contract. As I said before, a program has a reputation of being of a certain nature.

THE COURT: It has a reputation for a certain kind of music, and he has to have it on that hour.

MR. SPEISER: Yes.

MR. AMRAM: I think in view of this stipulation, I can ask Mr. Gimbel only a very few questions.

THE COURT: I think you can examine him and cross-examine him two hours and you wouldn't get any further. Both of you have that right, you have a right to examine and he has the right to cross-examine.

MR. SPEISER: I was trying to avoid it.

MR. AMRAM: Mr. Speiser, do you admit Mr. Gimbel's qualifications?

MR. SPEISER: I have already acknowledged what he is going to testify to.

MR. AMRAM: Do you admit his qualifications? I want to ask him two or three questions.

BENEDICT GIMBEL, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AMRAM:

Q Mr. Gimbel, you are president of Station WIP in Philadelphia?

A Yes, and general manager.

Q Did you hear Mr. Simon testify with respect to the make up of the various programs, and the nature of advertiser control over the various types of programs?

THE COURT: Are you going to ask him every-

thing you said you would prove with him if you would call him and he said he would agree to?

MR. AMRAM: Oh, no.

THE COURT: All right, then let the stenographer read the question. It isn't like what you said you were going to call him for.

MR. AMRAM: I simply wanted to have him corroborate Mr. Simon generally.

THE COURT: I thought that is what you said in your statements, and he agreed to it with the qualification.

MR. AMRAM: Then I will withdraw the question.

THE COURT: That he would say that it is the custom of their station to have spot advertising in just the same manner as Mr. Simon did. Isn't that what you want to prove?

MR. AMRAM: I am asking that, yes, and whether that is a uniform custom in the radio industry in the United States, to his knowledge.

THE COURT: I suppose he would say yes, and you agree to that.

MR. SPEISER: Yes.

MR. AMRAM: All right.

BY MR. AMRAM:

Q Mr. Gimbel, do you have participating shows on your station?

A We do.

Q Do you have one called the Eight Bells program, in the morning?

A We do.

Q What sort of program material is played on the Eight Bells program?

A Recorded music.

Q What time do you sell on that program?

MR. SPEISER: I object to this testimony.

THE COURT: I will have to overrule your objection, but I think it is all agreed on. I will let him answer that.

MR. AMRAM: Very well, I will withdraw the witness, if the Court please.

THE COURT: No, the Court is here to listen to anything you want to present.

THE WITNESS: Would you ask that question again?

THE COURT: Let the stenographer read it.

(The question was repeated by the reporter as follows:

"Q What time do you sell on that program?")

THE WITNESS: I don't understand that.

THE COURT: Better read the question ahead of that.

MR. AMRAM: I will rephrase the question.

THE COURT: All right.

BY MR. AMRAM:

Q On the Eight Bells program what nature of time do you sell to advertisers?

A That program is distinguished from other programs in that it is called a participation program, and we sell what we call participation, in that program. A sponsor or an agency buys a number of words to be used during the course of that program.

Q Who furnishes the program, the musical material?

A We do.

Q Does the advertiser participate at all in that?

A No.

Q Is the nature of the program always the same?

A Yes, virtually.

Q Is there any provision in your contracts with your advertisers that the nature of the program is always to remain the same?

A No.

MR. AMRAM: That is all.

CROSS-EXAMINATION

BY MR. SPEISER:

Q Mr. Gimbel, every radio station, as I understand it, for the purpose of lower advertising, attempts to establish what you have designated as a participation program, isn't that true?

A I believe so.

Q And in order to best promote that type of sale, is it not true that the stations generally attempt to establish a definite reputation among the public for that program?

A Yes.

Q Isn't it true that that is one of the reasons why you even name the program, just as I see you run a program known as Eight Bells?

A We change the names frequently.

Q Do you change it at the time, at the same time of the day?

A I don't understand what you mean.

Q Eight bells means what to you now on Station WIP?

A It means a program that -- that particular program has changed its time and form, not in practical content, several times, as a matter of fact.

Q What do you mean?

BY THE COURT:

Q What do you mean that it is? You started to answer that and changed it.

A Would you state that question?

Q What program does your Eight Bell program mean?

A It is a musical program made up of recordings interspersed with commercial announcements.

BY MR. SPEISER:

Q Running from --

A 8:00 to 9:30, approximately.

Q How long has your Eight Bells program been on the air at WIP?

A Several years.

Q It has always been musical recordings?

A Yes, I believe it has.

Q And not only musical recordings, Mr. Gimbel, but musical recordings of a specific type of music?

A Not necessarily, no, we use all types of music. We don't put any operatic tunes on it, the lighter type of music.

Q Eight Bells has a reputation in Philadelphia as a definite program of WIP, doesn't it?

A I hope so.

Q Does WPEN have a program, to your knowledge, which they name?

A I think they have several.

Q Give me the name of one?

A The 920 Club is one.

Q Is that a participating program, to your knowledge?

A To my knowledge, it is.

Q You know what 920 Club means?

A That is their frequency on the dial. I suppose they just named it that.

Q And the purpose of naming a program is what, Mr. Gimbel?

A To identify it.

Q To identify it for what purpose?

A I don't know exactly, I suppose --

Q For the purpose of making the public become acquainted with a specified hour on a specified station so that they can say, "Do you listen to Eight Bells on WIP, or the 920 Club on WPEN?"

A No.

Q It is not?

A No.

Q What is it for?

A It is more -- I think it is more to popularize the

program, itself, than the time of the program. May

I amplify that?

Q Yes.

A We have a program, for example, called Melody Matinee, which we run at a certain time. When we broadcast the baseball games we move the entire program, maintaining the same name, to a completely different hour.

Q Right, so it is not specifically the time of day, but you maintain the title so that when I say Melody Matinee to a radio listener, or when I see Melody Matinee printed in the newspaper, I know that I am going to be able to hear a certain type of entertainment?

A Well, on some stations, yes; on others, no.

Q Let us say on WIP when I read Melody Matinee in the newspaper I know I am going to hear a certain type of entertainment, do I not?

A No, sometimes we change the content of that completely.

Q You do?

A Yes.

Q And Eight Bells, as well?

A Eight Bells has remained constant pretty regular.

Q What do you run on Melody Matinee?

A We have used recordings, we have used transcriptions, and we have used a live orchestra.

Q The station orchestra?

A Yes.

MR. SPEISER: I think that is all.

REDIRECT EXAMINATION

BY MR. AMRAM:

Q Mr. Gimbel, I think we have been talking too much about participating shows. Is there any other way in which an advertiser can buy announcement time except on a participating show?

A Yes.

Q What kind of way?

A There are three or four classifications. There is what is known as station break.

Q What is station break?

A A station break is an announcement of a maximum number of words purchased between programs at specified times, between a program ending at 7:29 and beginning thirty seconds afterward -- between the two programs. That is one. The other is what we call a run of schedule announcement, which is a spot announcement of a maximum number of words which is used and put in at the discretion of the station, not at a guaranteed time. In

other words, the John Jones Shoe Company would buy three run-of-schedule announcements per day over WIP, to have no control over where they were placed. We sell them cheaper.

Q Outside of run-of-the-schedule, what is there?

A You know about participation. There is a difference in the number of words in both of those classifications. You buy 50 or 100 words, which means a different price. There is also the purchase of units of time, five minutes, fifteen minutes, a half an hour, and a strip of units of time. That is about all.

Q Mr. Gimbel, in connection with the programs such as Eight Bells or similar programs, is it a fact that on some of your programs perhaps the particular talent and ability of the announcer is as much a feature as the musical content or other program content of the program?

A Unquestionably.

Q Do you have an illustration of that on your station?

A Unquestionably.

THE COURT: If one announcer is competent or very incompetent, it would not help me to decide the legal question, would it?

MR. AMRAM: No, it wouldn't. I brought that out in view of Mr. Speiser's statement that the

musical content identified the program, and I wanted to point out, in addition to that, certain programs were popular not because of the music, but because of the wit and talent of the announcer.

THE COURT: My general feeling is that whether the announcer is very capable or very incapable it won't help me any.

MR. AMRAM: No, because in no case does the advertiser have control of the program. I intended to save the time of the Court by not calling him, but Mr. Speiser caused me to do it.

THE COURT: All right.

MR. AMRAM: If the Court please, I think that is all the case for the defendant petitioner in support of the removal proceeding.

DEFENDANTS REST

MR. SPEISER: May it please the Court, I have no testimony, and I can only ask Your Honor to afford me the opportunity, either orally or in a brief, to submit the legal proposition as I understand it.

THE COURT: Would you prefer to submit

briefs or to argue it orally?

MR. SPEISER: My preference is yours, sir.

THE COURT: It doesn't matter very much to me. I won't have any argument court until the 6th of January. Of course, I have a lot of opinions to write before that and I may not dispose of it even if you hand in briefs tomorrow.

MR. SPEISER: I was somewhat familiar with Your Honor's rush.

THE COURT: It doesn't matter to me. I will give you the opportunity to hand in briefs and argue it on the 6th of January.

MR. AMRAM: If the Court please, before that is decided, may I say, for the purpose of the record, that I am prepared, if necessary, to secure and offer testimony with respect to the subjective state of mind of the plaintiffs with respect to the joinder of the defendants. For that purpose, I suppose I would have to call Mr. Speiser as a witness, and also take the testimony of the plaintiffs by deposition in New York, and offer in evidence the record of certain court proceedings brought by these same plaintiffs against other stations in Philadelphia and elsewhere. But I rather

gained from what Mr. Speiser said that for the purposes of the disposition of this hearing we need not go into the subjective state of mind of the plaintiffs in joining these advertiser defendants, but can dispose of the case on the broader grounds that we have been discussing during the course of the testimony. Is that correct?

MR. SPEISER: As I understand the law, the subjective state of mind is immaterial. In other words, if I have a case against these defendants, my intent can be thoroughly malicious; the proposition is purely whether I have an action against them.

THE COURT: I would think so. I think the other wouldn't help us much.

MR. AMRAM: I didn't think it would, myself, except I am prepared to offer further testimony by taking depositions in New York, if the Court thinks it is relevant.

THE COURT: It is quite a task to prove that subjective state of mind.

MR. AMRAM: It is. I didn't feel from reading the case, it was necessary, but I wanted to protect myself on the record so that the Court would not dispose

of it on that ground.

THE COURT: I will let you two gentlemen agree whether you want to hand in briefs at a certain time or argue it on the 6th of January.

MR. AMRAM: I am at Mr. Speiser's pleasure.

MR. SPEISER: Shall we agree and let Your Honor know?

THE COURT: Yes. I think we will mark it for argument, January 6th, and if before that time both of you decide to submit briefs and want to dispense with the argument, we will dispense with the argument.

MR. AMRAM: Very well.

Reported by

Lewis A. Bicking.

DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION, FILE NUMBER 939

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

Vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC.,
KEITH TAILORS, INC.,
ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG and HERMAN
SCHAEFFER, Individually and
Trading as BAILEY'S FURNITURE CO.

MOTION TO REMAND

FILED
JUL 3 - 1940
GEORGE BRODBECK, Clerk
By.....*[Signature]*.....Dpty Clerk

TO THE HONORABLE THE JUDGES OF THE SAID COURT:-

And now, to wit, this 3rd day of July, A.D. 1940,
comes the plaintiff by its attorneys SPEISER & SPEISER and ap-
pearing specially for the purposes of this motion only, saving
and reserving any and all objections which they have to the
manifold imperfections in the mode, manner and method of the
removal papers and expressly denying that this court has juris-
diction of this cause or of the plaintiff therein, respectfully
moves the court to remand this cause to the Court of Common
Pleas No. 6 of Philadelphia County, Pennsylvania, from whence
it was removed, for the following reasons:-

1. That the said suit does not really or substan-
tially involve a dispute or controversy properly within the juris-
diction of your Honorable Court.

2. That the defendants are not all residents or
citizens of States other than Pennsylvania, the State wherein the
action was brought.

3. That it does not appear from the record that
there is a controversy which is wholly between citizens of differ-
ent states which can be tried and fully determined without in-

volving necessarily a trial of the whole case as to all defendants.

4. That it does not appear from the record that the cause is separable as to the defendant WM. PENN BROADCASTING COMPANY.

5. That it does not appear from the record that the defendants resident in Pennsylvania were or have been wrongfully joined as such.

In support of the foregoing reasons and in specific answer to the Amended Petition For Removal, the plaintiff further avers:-

1. Admitted

2. Admitted

3 (a) The identity and nature of organization of the plaintiff and defendant WM. PENN BROADCASTING COMPANY is admitted, but it is denied that the action involves a controversy solely between them, and on the contrary it is averred that the action involves a controversy between the plaintiff and all of the defendants, as set forth in plaintiff's Bill of Complaint.

3 (b) Denied and on the contrary it is averred that the remaining enumerated defendants (hereinafter referred to as "Advertisers") were properly and in good faith joined as parties defendant.

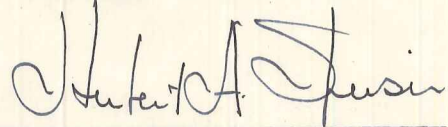
3 (c) The plaintiff has no knowledge of the facts averred in paragraph 3 (c) of the Amended Petition For Removal, the same being solely within the knowledge of the defendants. Demand is hereby made that if same be pertinent or material to the issue, that due and proper proof thereof be rendered upon the hearing of this motion.

In further answer, plaintiff denies that the said additional defendants were joined for the sole purpose of preventing the removal of the action to the Federal Court, and on

the contrary avers they were properly and in good faith joined as parties defendant.

WHEREFORE, the plaintiff respectfully moves your Honorable Court to remand this cause to the Court of Common Pleas No. 6 of Philadelphia County, Pennsylvania, from whence it was removed.

SPEISER & SPEISER

A handwritten signature in dark ink, appearing to read "Herbert A. Speiser", written in a cursive style.

Attorneys for Plaintiff

EXEMPLIFICATION

939 Civil Action

Philadelphia County }
STATE OF PENNSYLVANIA }Sct.

Among the Records and Proceedings of the Court of Common Pleas,
No. 6 for the County of Philadelphia, State of Pennsylvania, the
following may be found as matter of File and of Record, at No. 4508
December Term, 1939, to wit:

FILED

JUN -8 1940

GEORGE BRODBECK, Clerk
Dpty Clerk

DOCKET ENTRIES

Speiser & Speiser.	NATIONAL ASSOCIATION OF PERFORM- ING ARTISTS, by JAMES J. WALKER and FRED WARING, Trustees Ad Litem,	Bill in Equity; Filed Feb. 15, 1940. March 9, 1940. Defendant's Peti- tion for Removal of this case to the U. S. District Court filed. March 9, 1940. Petition granted. Eo die; Order made. March 9, 1940. Bond for \$500.00; National Surety Corp., Surety for Removal Bond.
4508	vs.	
Feb.23,1940; I. Jack Fein- stein, Atty. for Keith Tailors, Inc., one of Defts.	WM. PENN BROADCASTING COMPANY, P. B. WHITE CO., INC., KEITH TAILORS, INC., ROYAL SHOE MARKET, INC., MORRIS EISENBERG and HERMAN SCHAEFFER, Individually and Trad- ing as BAILEY'S FURNITURE CO.	Mar. 21, 1940. Stipulation of Counsel and approval of Court that the Order removing this cause to the U. S. District Court be re- scinded, with leave to plaintiff to reply or otherwise answer the said Deft's petition for removal within 10 days from the date here- of filed. March 26, 1940. Answer to Petition for Removal, raising Questions of Law, filed. Apr. 19, 1940. Amended petition for Removal of this case to U. S. District Court filed. Apr. 25, 1940. Petition granted. Eo die; Order made.
Feb.29,1940; P.W.Amram,Atty. for Wm.Penn Broadcasting Co., P.B.White Co.,Inc., Royal Shoe Market, Inc., and Morris Eisenberg and Her- man Schaeffer, Ind. and trdg. as Bailey's Furni- ture Co.,filed.	Feb. 15, 1940. Bill in Equity filed. Eo die; Rule to appear and answer filed. March 18, 1940. Affdt. of Serv- ice of Copies of Bill of Com- plaint & Notice to appear and answer, on Defts., on Feb. 16, 1940, filed. Apr. 22, 1940. Answer to Amended Petition for Removal, raising Questions of Law, filed.	

C. P. No. 6, December Term, 1939 - No. 4508. Continued.

May 22, 1940. Questions of law raised in Answer to Amended Petition resolved in favor of the Defendant, Petitioner and against Plaintiff, Respondent. Eo die; Order for Removal dated Apr. 25, 1940, confirmed.

NATIONAL ASSOCIATION OF PERFORM-
ING ARTISTS By JAMES J. WALKER and by virtue of the laws of
and FRED WARING, Trustees Ad
Litem Commonwealth of Pennsylvania.

C.P. NO. 6

DECEMBER TERM, 1939

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC., KEITH
TAILORS, INC., ROYAL SHOE
MARKET, INC., MORRIS EISENBERG
and HERMAN SCHAEFFER, Indivi-
dually and Trading as BAILEY'S
FURNITURE CO.

NO. 44508

IN EQUITY

BILL IN EQUITY

TO THE HONORABLE THE JUDGES OF THE SAID COURT:

of music, NATIONAL ASSOCIATION OF PERFORMING ARTISTS brings this
Bill of Complaint against WM. PENN BROADCASTING COMPANY, P. B.
White Co., INC., KEITH TAILORS, INC., ROYAL SHOE MARKET, INC., abuses
MORRIS EISENBERG and HERMAN SCHAEFFER, Individually and Trading
as BAILEY'S FURNITURE CO., Defendants, and thereupon complains and
says: and their personalities; to assure them against the unfair
and unequal.

1. The Plaintiff NATIONAL ASSOCIATION OF PERFORMING
ARTISTS is an unincorporated voluntary association organized and
existing under and by virtue of the laws of the State of New York.

2. The defendant WM. PENN BROADCASTING COMPANY is a
corporation organized and existing under and by virtue of the laws
of the State of Delaware and duly registered to do business in the
Commonwealth of Pennsylvania.

3. The defendant P. B. WHITE CO., INC., is a corporation
organized and existing under and by virtue of the laws of the State
of Delaware and duly registered to do business in the Commonwealth
of Pennsylvania.

4. The defendant KEITH TAILORS, INC. is a corporation
organized and existing under and by virtue of the laws of the
Commonwealth of Pennsylvania.

5. The defendant ROYAL SHOE MARKET, INC. is a corpora-

tion organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

6. The defendants MORRIS EISENBERG and HERMAN SCHAEFFER are residents of the County of Philadelphia, Commonwealth of Pennsylvania, where as co-partners they are engaged in business under the fictitious trade name of BAILLY'S FURNITURE CO.

7. NATIONAL ASSOCIATION OF PERFORMING ARTISTS is composed of upwards of Six Hundred (600) members (a list of whom is attached hereto, made a part hereof and marked Exhibit "A"), who are outstanding performers and interpretive artists in the fields of music, radio, motion pictures and the stage.

8. NATIONAL ASSOCIATION OF PERFORMING ARTISTS was organized, inter alia, to protect its members against piratical abuses and competitive practices of all kinds; to secure them against the unauthorized use of their interpretations and performances, their names and their personalities; to secure them against the unfair and unconscionable usurpation of their property in their interpretations and performances; to prevent interference with their property rights; and to enforce said rights by proper actions; Legal, Equitable or otherwise.

9. Article III, Section 5 of the By-Laws of NATIONAL ASSOCIATION OF PERFORMING ARTISTS provides as follows:

OBLIGATION OF APPLICANT. From and after the admission of any applicant to membership

(a) There shall automatically be vested in the association, without need of further assignment, all the member's right, title, interest and property in and to all his and his musical or other organization's recorded and unrecorded renditions, interpretations and performances, regardless of whether already made or performed, or made or performed thereafter.

(B) There shall likewise be vested in the Association the exclusive right to license, or to refrain from licensing, the use, reproduction and performance of all such renditions, inter-

pretations and performances in any manner and in any medium.

(c) There shall likewise be vested in the Association the right to institute and maintain suits and actions in the name of the Association or the member or both: (1) To restrain any unauthorized use of any renditions, interpretations and performances or to collect damages therefor or both; (2) To restrain any and all acts of unfair competition and unconscionable practices; (3) To restrain the unauthorized use of his name and personality in connection with the use and reproduction of said renditions, interpretations and performances.

10. The defendant WM. PENN BROADCASTING COMPANY, at the times hereinafter mentioned, owned and operated and presently owns and operates Radio Broadcasting Station WPEN in the City and County of Philadelphia.

11. The Defendant WM. PENN BROADCASTING COMPANY operates said Station WPEN for the purpose of profit, and in the course of its business features the broadcasting of phonograph records on both sustaining and commercial programs.

12. The Defendants P. B. WHITE CO., INC., KEITH TAILORS, INC., ROYAL SHOE MARKET, INC., MORRIS EISENBERG and HERMAN SCHAEFFER, Individually and Trading as BAILEY'S FURNITURE CO. are customers of and are severally co-adventurers with the defendant WM. PENN BROADCASTING COMPANY in the presentation of radio programs wherein phonograph records are broadcast, said programs being used to advertise, publicize and exploit the business, products, wares and services of the defendants.

13. At divers times, and more specifically on or about January 25th and 26th, 1940, the said defendants in furtherance of their respective businesses caused to be broadcast over Station WPEN a number of phonograph records embodying interpretive performances rendered by plaintiff's members, among which were the following:

(A) "Bluebirds In the Moonlight"
By Benny Goodman

(B) "Ooh! What You Said"
By Hal Kemp

(C) "Heaven in My Arms"

By Benny Goodman

(D) "All the Things You Are"

by Johnny Green

14. The broadcast of the phonograph records as aforesaid, was done by the defendants with full knowledge of plaintiff's rights and without its consent or authority and with full knowledge that said phonograph records were made and sold for non-commercial use on phonographs in homes only.

15. The said records which were purchased by defendants and broadcast, as aforesaid, contained a notice to the effect that they were to be used for non-commercial use on phonographs in homes only.

16. The broadcast of the phonograph records by defendants, as aforesaid, constituted:-

- (A) A wrongful and unconscionable use by the defendants of plaintiff's property and property rights.
- (B) A violation of plaintiff's common law property rights in and to the said interpretations, renditions and performances.
- (C) A violation of the respective notices regarding the use of said records.
- (D) Unfair competition with the plaintiff and its members.
- (E) An unlawful use of said members' names and personalities.
- (F) A violation of said members' right of privacy.

17. Plaintiff has no adequate remedy at law for the prevention of the above mentioned acts of defendants, which caused and will continue to cause irreparable injury and damage as aforesaid, unless enjoined by your Honorable Court.

WHEREFORE, plaintiff prays:-

1. That a decree may be entered perpetually restraining and enjoining the defendants, their or either of

STATE OF NEW YORK
COUNTY OF NEW YORK

successors, assigns, agents, employees, representatives, and attorneys and each of them, from using or causing to be used any phonograph records embodying renditions, interpretations and performances of any member or members of the plaintiff, for radio broadcast or any other commercial use without the consent or permission of the plaintiff.

2. That plaintiff's costs incurred herein be paid by defendants.

3. For such other, further and different relief as to this Court may seem just and proper.

SWORN TO AND SUBSCRIBED)
BEFORE ME THIS 14th DAY)
OF FEBRUARY, A. D. 1940)

/s/ SPEISER & SPEISER

SHAL

/s/ Herbert A. Speiser (signed)
Attorneys for Plaintiff

/s/ Elizabeth Hartridge
Notary Public

(Notary Public, Westchester County)

Cert. Filed N.Y. Co. No. 921 Reg. No. 18 503

My Commission expires March 30, 1941

(Note)

EXHIBIT "A"--- (MEMBERSHIP LIST OF NATIONAL ASSOCIATION
IS ATTACHED TO NEXT OF PERFORMING ARTISTS)
PAGE.

STATE OF NEW YORK
COUNTY OF NEW YORK

SS:

JAMES J. WALKER and FRED WARING, being duly sworn according to law depose and say that they are respectively President and Vice-President of the NATIONAL ASSOCIATION OF PERFORMING ARTISTS, duly authorized to bring this action as Trustees Ad Litem, and that the facts contained in the foregoing Bill of Complaint are true and correct, to the best of their knowledge, information and belief.

SWORN TO AND SUBSCRIBED)
BEFORE ME THIS 14th DAY)
OF FEBRUARY, A. D. 1940)

/s/ James J. Walker

/s/ Fred Waring

SEAL

/s/ Elizabeth Hartridge

Notary Public

(Notary Public, Westchester County)

Cert. Filed N.Y. Co. No. 921 Reg. No. 1H 563

My Commission expires March 30, 1941

(Note)

EXHIBIT "A"--- (MEMBERSHIP LIST OF NATIONAL ASSOCIATION
IS ATTACHED TO NEXT OF PERFORMING ARTISTS)
PAGE.

C. P. No. 6

No. 4508 Dec. Term, 1939

In Equity.

NATIONAL ASS'N OF PERFORMING
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem,

vs.

WM. PENN BROADCASTING CO., et al.

BILL IN EQUITY

To the within Defendants:-

Unless you have already done so, you are hereby notified and required within fifteen days after the service upon you of this bill in equity, to enter a written appearance, to the term and number hereon stated, in the office of the prothonotary of the Court of Common Pleas of Phila. County, Penna., specifying therein a person and place, within said county, where papers, process and notices may be served upon you; and within thirty days after such service you are required to make a full and complete answer, under oath, to each and every of the averments of this bill. If you fail in either respect, the bill may be taken pro confesso and a decree made against you in your absence.

Pd. \$5.00.
Speiser & Speiser,
Herbert A. Speiser,
Attorneys for Plaintiff.

Filed Feb. 15, 1940;
J. Orr,
Pro. Prothy.

Speiser & Speiser, Attys.-at-Law.

NATIONAL ASSOCIATION OF PERFORMING ARTISTS, By JAMES J. WALKER and FRED WARING, Trustees Ad Litem : C. P. NO. 6
 vs. : December Term, 1939
 WM. PENN BROADCASTING COMPANY : No. 4508 In Equity

ENTRY OF APPEARANCE

TO THE PROTHONOTARY:
 Enter by appearance for WM. PENN BROADCASTING COMPANY;
 P. B. WHITE CO., INC.; ROYAL SHOE MARKET, INC.; and MORRIS
 EISENBERG and HERMAN SCHAEFFER, Individually and Trading as
 BAILEY'S FURNITURE CO., defendants named in the above matter.

P. W. AMRAM
 Attorney for Defendants.

1. The above entitled action has been brought in this court and is now pending there within which the defendant is required to answer or otherwise plead has not yet expired.

2. Said action is of a civil nature and the value of the matter in controversy is in excess of \$5,000.00.
 February 29, 1940.

3. (a) The said action involves a controversy solely between the plaintiffs who are stated in the Bill in Equity to be an unincorporated voluntary association organized and existing under and by virtue of the laws of the State of New York, and the defendant Wm. Penn Broadcasting Company, which is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

(b) The defendants P. B. White, Co. Inc., Keith Tailors, Inc., Royal Shoe Market, Inc., and Bailey's Furniture Co. are improperly joined and have not been joined in good faith

No. 4508
 C. P. No. 6
 Dec. Term, 1939
 In Equity.

Wolfe, Block, Schorr and Soffa-
 Kniffel Meunier, Amram,
 Cohen.

NATIONAL ASSOCIATION OF PERFORMING ARTISTS by JAMES J. WALKER and FRED WARING, Trustees Ad Litem in Equity to the effect that the

said four vs. additional defendants are co-adventurers with the

WM. PENN BROADCASTING COMPANY, Company December Term, 1939
P. B. WHITE CO., INC., KEITH
TAILORS, INC., ROYAL SHOE
MARKET, INC., MORRIS EISENBERG
and HERMAN SCHAEFFER, Individually : plaintiffs' Bill in Equity
and Trading as BAILEY'S FURNITURE
CO. : No. 4508 In Equity

4. Your petitioner presents herewith a good and
sufficient PETITION FOR REMOVAL TO THE FEDERAL COURT
will enter in the District Court of the United States for the

Eastern District of Pennsylvania within thirty days from the
TO THE HONORABLE, THE JUDGES OF SAID COURT:

Date of filing of this Petition a certified copy of the record

In this suit The petition of WM. PENN BROADCASTING COMPANY, one
of the defendants above named, respectfully represents to this Court
Honorable Court: This suit was wrongfully or improperly removed

1. The above entitled action has been brought in
this court and is now pending therein; and the time within
which the defendant is required to answer or otherwise plead
has not yet expired.

2. Said action is of a civil nature and the
value of the matter in controversy is in excess of \$3,000.00.

3. (a) The said action involves a controversy
solely between the plaintiffs who are stated in the Bill in
Equity to be an unincorporated voluntary association organized
and existing under and by virtue of the laws of the State of
New York, and the defendant Wm. Penn Broadcasting Company, which
is a corporation organized and existing under and by virtue of
the laws of the State of Delaware.

(b) The defendants P. B. White, Co. Inc., Keith
Tailors, Inc., Royal Shoe Market, Inc., and Bailey's Furniture
Co. are improperly joined and have not been joined in good faith

by the plaintiffs, the plaintiffs knowing or having cause to know that the averments in the Bill in Equity to the effect that the said four additional defendants are co-adventurers with the defendant Wm. Penn Broadcasting Company and that the said four defendants participated in the broadcasting of the phonograph records which are the basis of the plaintiffs' Bill in Equity are not correct.

4. Your petitioner presents herewith a good and sufficient bond as provided by statute in such cases, that it will enter in the District Court of the United States for the Eastern District of Pennsylvania within thirty days from the date of filing of this Petition a certified copy of the record in this suit, and that it will pay all costs which may be awarded by the said District Court in case the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Notary Public

WHEREFORE your petitioner prays that this court proceed no further herein excepting to make an order accepting the bond presented herewith, and directing that a transcript of the record herein be made and filed in the United States District Court aforesaid.

WM. PENN BROADCASTING COMPANY

BY:

Harold A. Lafount
Vice Pres

STATE OF

COMMONWEALTH OF

New York
County of NY

WM. PENN BROADCASTING COMPANY,
P. WHITE CO. INC. KAITH

Harold A Lafount being duly sworn according to
law, deposes and says that he is *Vice Pres.*
of Wm. Penn Broadcasting Company, petitioner above named; that
he is authorized to and does make this affidavit for and on its
behalf; and that the facts set forth in the foregoing petition
are true to the best of his knowledge, information and belief.

Bond of the defendant, Wm. Penn Broadcasting Company, for an
Sworn to and subscribed to cause to the United States District
before me this *7* day *March* *Harold A Lafount*
of *March* 1940 defendant has filed its Petition for such

removal in due form of law and that the defendant has filed its
George Cohen
Notary Public
My Commission Expires
3/30/40
legal action thereof, and it appearing to the Court that this is
a proper cause for removal to the said District Court,

NOW THEREFORE, said Petition and Bond are hereby
accepted and it is hereby ORDERED AND ADJUDGED that this cause
be and it is hereby removed to the United States District Court
for the Eastern District of Pennsylvania, and the Clerk is
hereby directed to make up the record in said cause for trans-
mission to said Court forthwith.

That it is Dated this *10th* day of March, 1940.
BY THE COURT, United States District Court for the Eastern District of Pennsylvania.
I hereby certify that a copy of the record in this cause, and shall well and
truly pay all costs that may be assessed against the defendant.
Boh
P. J.

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

C. P. NO. 6

vs.

December Term, 1939

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO. INC., KEITH
TAILORS, INC., ROYAL SHOE MARKET,
INC., MORRIS EISENBERG and HERMAN
SCHAFFER, Individually and Trading
as BAILEY'S FURNITURE CO.

December Term, 1939

No. 4508 In Equity

ALL MEN BY THESE PRESENTS THAT WM. PENN BROADCASTING
COMPANY, as principal, and NATIONAL ASSOCIATION OF PERFORMING
ARTISTS, as surety, are in this cause coming on for hearing upon Petition and
Bond of the defendant, WM. Penn Broadcasting Company, for an
order transferring this cause to the United States District
Court for the Eastern District of Pennsylvania, and it appearing
to the Court that the defendant has filed its Petition for such
removal in due form of law and that the defendant has filed its
Bond duly conditioned, with good and sufficient sureties, as
provided by law, and that defendant has given plaintiff due and
legal notice thereof, and it appearing to the Court that this is
a proper cause for removal to the said District Court,

NOW THEREFORE, said Petition and Bond are hereby
accepted and it is hereby ORDERED AND ADJUDGED that this cause
be and it is hereby removed to the United States District Court
for the Eastern District of Pennsylvania, and the Clerk is
hereby directed to make up the record in said cause for trans-
mission to said Court forthwith.

that if the Dated this 9th day of March, 1940. shall enter in the
said District BY THE COURT, United States within thirty (30) days
from date a copy of the record in this suit, and shall well and
truly pay all costs that may be awarded by said District Court
in case the said District Court shall hold that the suit was

In Equity.

No. 4508

Dec. Term, 1939

C. P. No. 6

WOLF, Brock, Schorff and
Cohen.

Bok
P. J.

NATIONAL ASSOCIATION OF PERFORMING : C. P. NO. 6
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem :
December Term, 1939

vs. :

WM. PENN BROADCASTING COMPANY : No. 4508 In Equity

Signature of Principal
Waived by Surety
National Surety Corporation
by D. Robert Feitig
Atty.-in-fact.

BOND FOR REMOVAL

KNOW ALL MEN BY THESE PRESENTS that WM. PENN BROADCASTING COMPANY, as principal, and NATIONAL SURETY CORPORATION, as surety, are held and firmly bound unto the NATIONAL ASSOCIATION OF PERFORMING ARTISTS by James J. Walker and Fred Waring, Trustees Ad Litem, in the penal sum of FIVE HUNDRED (\$500.00) DOLLARS, for the payment whereof well and truly to be made unto the said NATIONAL ASSOCIATION OF PERFORMING ARTISTS, its successors or assigns, we bind ourselves, our successors and assigns, jointly and severally, as follows;

STATE OF PENNSYLVANIA :
WHEREAS the said WM. PENNBROADCASTING COMPANY having petitioned the Court of Common Pleas No. 6 of Philadelphia County for the removal of a certain cause therein pending, wherein the said NATIONAL ASSOCIATION OF PERFORMING ARTISTS is plaintiff and the said WM. PENN BROADCASTING COMPANY is defendant, to the District Court of the United States within and for the Eastern District of Pennsylvania;

NOW THEREFORE, the condition of this obligation is such that if the said WM. PENN BROADCASTING COMPANY shall enter in the said District Court of the United States within thirty (30) days from date a copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said District Court in case the said District Court shall hold that the suit was

APPLICATION FOR APPROVAL AS SURETY

...wrongfully or improperly removed thereto, then this obligation
to be void, otherwise to be in full force and effect.

COUNTY OF

On this... WITNESS our hands and seals this 9th day of March, 1940.
scribe, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia,

Signature of Principal
Waived by Surety
National Surety Corporation
by L. Robert Feitig
Atty.-in-fact.

BOND FOR

Principal
NATIONAL SURETY CORPORATION
L. Robert Feitig
Atty.-in-fact.

New York, N. Y. Corporation created by and existing under the laws of the State of New York, with
offices at 306... Street, Philadelphia, Pa.
The amount of capital paid in cash is \$2,500,000.00 divided into 250,000 shares, all of which have
been issued at a value of \$10.00 each.
Sworn and subscribed before
me the day and date aforesaid

STATE OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA : SS

Before Me appeared NATIONAL SURETY CORPORATION by L. ROBERT
FEITIG, Attorney-in-fact, personally known to me to be the
surety described in and who executed the foregoing instrument and
who acknowledged to me that he executed the same.

Prothonotary.

APPLICATION FOR APPROVAL AS SURETY

In Accordance With Rules 37-43 Of Common Pleas Courts of Philadelphia County

STATE OF PENNSYLVANIA }
COUNTY OF } ss.

On this 9th day of March, A. D. 1940, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared L. Robert Feitig who being duly sworn according to law, did depose and say that he is the attorney - in - fact of the NATIONAL SURETY CORPORATION of New York, N. Y., a corporation created by and existing under the laws of the State of New York, with offices at 306 Walnut Street, Philadelphia, Pa.

The amount of capital paid in cash is \$2,500,000.00 divided into 250,000 shares, all of which have been issued at a par value of \$10.00 each.

Sworn and subscribed before
me the day and year aforesaid

Walter H. Stafford
Notary Public

L. Robert Feitig
Attorney-in-fact

NOTARY PUBLIC
My Commission Expires Aug. 2, 1942

(Attach Financial Statement in this Space)

F. 490

NATIONAL SURETY CORPORATION

NEW YORK

FINANCIAL STATEMENT -- DECEMBER 31, 1939

VINCENT CULLEN, PRESIDENT.

BALLARD MCCALL, SECRETARY.

ASSETS

Cash in Banks.....	\$ 3,097,082.84
Investments	
Bonds.....	\$ 7,968,173.85
Preferred and Guaranteed Stocks.....	4,996,311.16
Common Stocks.....	7,590,725.00
	20,555,210.01
Premiums in Course of Collection, Not Over 90 Days Due.....	1,076,346.20
Accrued Interest, Dividends and Rents.....	115,517.37
Reinsurance and Other Accounts Receivable.....	57,084.79
Home Office Building.....	500,000.00
Total Admitted Assets.....	<u>\$25,401,241.21</u>

LIABILITIES

Reserve for Losses.....	\$ 3,837,716.64
Reserve for Loss Adjustment Expenses.....	720,500.00
Reserve for Unearned Premiums.....	5,627,263.64
Reserve for Commissions, Expenses and Taxes.....	907,633.23
*Contingency Reserve.....	251,178.01
Capital.....	\$ 2,500,000.00
Surplus.....	11,556,949.69

Total Capital and Surplus..... 14,056,949.69

been issued at a par value of \$10.00 each.

Sworn and subscribed before
me the day and year aforesaid

Walter W. Stafford
Notary Public

L. Robert Feitig
Attorney-in-fact

NOTARY PUBLIC
My Commission Expires Aug. 2, 1942

(Attach Financial Statement in this Space)

F. 490

NATIONAL SURETY CORPORATION

NEW YORK

FINANCIAL STATEMENT -- DECEMBER 31, 1939

VINCENT CULLEN, PRESIDENT.

BALLARD MCCALL, SECRETARY.

ASSETS

Cash in Banks.....	\$ 3,097,082.84
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Bonds	\$ 7,968,173.85
Preferred and Guaranteed Stocks.....	4,996,311.16
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*Contingency Reserve	251,178.01
Capital	\$ 2,500,000.00
Surplus	11,556,949.69
Total Capital and Surplus.....	14,056,949.69
Total	\$25,401,241.21

*Represents difference between total values carried in assets for all bonds and stocks owned and total values based on December 31, 1939 market quotations.

Bonds carried at \$1,266,005.90 are deposited for purposes required by law and bonds carried at \$31,022.40 are deposited as collateral on surety bonds required in court proceedings.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

A. N. MacDougall

....., being duly sworn, says: That he is Assistant Secretary of NATIONAL SURETY CORPORATION, that said Corporation is a Corporation duly organized, existing and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of Pennsylvania applicable to said Corporation, and is duly qualified to act as surety under such Laws; that said Corporation has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and to Allow Certain Corporations to be Accepted as Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial condition of said Corporation on the 31st day of December, 1939.

Sworn to before me this

1st

day of

February

1940

Harriet C. Kochman

Notary Public

HARRIET C. KOCHMAN
Notary Public, Richmond County
Certificate filed in New York County
Clerk's Number 611
Commission Expires March 30, 1941

Ballard McCall
Assistant Secretary.

Dec. Term 193

Equity

SS'N OF PERFORMING
JAMES J. WALKER and
Trustees Ad Litem,
vs.

BROADCASTING COMPANY,
TE CO., INC.

SURETY CORPORATION

Removal

500.00

Mar. 9, 1940

BOK

J.

Mar. 9, 1940;

Einingen,
Pro. Prothy.

NATIONAL ASSOCIATION OF PERFORMING : C. P. NO. 6
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem :

vs.

in person at 638 Market Street, Philadelphia, Pa.

WM. PENN BROADCASTING COMPANY, : December Term, 1939

P. B. WHITE CO., INC., Schaeffer by handing the same to him in

KEITH TAILORS, INC., :

ROYAL SHOE MARKET, INC., Philadelphia, Pa.

MORRIS EISENBERG and HERMAN :

SCHAEFFER, Individually and

Trading as BAILEY'S FURNITURE CO. : No. 4508 In Equity

Sworn to and subscribed

(Sgd) Frank J. Canning

before me this 20th AFFIDAVIT OF SERVICE

of February, A. D. 1940

STATE OF PENNSYLVANIA :

SS

COUNTY OF PHILADELPHIA :

David Malachuk

Notary Public

My Commission Expires 3/10/41

FRANK J. CANNING, being duly sworn according to
law, deposes and says that on the 16th day of February, 1940,
he duly served upon each of the above named defendants a copy
of the Bill of Complaint, with a notice endorsed thereon to
cause an appearance in the above entitled case to be entered,
to file an answer, etc., as follows:-

Upon Wm. Penn Broadcasting Company by handing the
same to Arthur Simon, General Manager, the person then and
there in charge, at the Southeast Corner of 22nd and Walnut
Streets, Philadelphia, Pa.

Upon P. B. White & Co., Inc., by handing the same
to P. B. White, the person then and there in charge, at 804
Chestnut Street, Philadelphia, Pa.

Upon Keith Tailors, Inc., by handing the same to
Benjamin Heilbron, Treasurer, at 808 Chestnut Street, Phila-
delphia.

Upon Royal Shoe Market, Inc., by handing the same to
Miss Fay Stein, the person then and there in charge, at

BOXYI SHOE WORKS, INC.
KEITH AVIGOR, INC.
B. B. WHITE CO., INC.
ALL-LEAD BROADCASTING COMPANY

December Term 1939

USED "MAYING" Employees vs. Green
VILLAGE of JAMES I. MATHEN and
NATIONAL ASSOCIATION OF BENEVOLENCE

48 North 3rd Street, Philadelphia, Pa.

Upon Morris Eisenberg by handing the same to him
in person at 635 Market Street, Philadelphia, Pa.

Upon Herman Schaeffer by handing the same to him in
person at 635 Market Street, Philadelphia, Pa.

Sworn to and subscribed
before me this 20th day
of February, A. D. 1940

(Sgd) Frank J. Canning

(Seal)

David Balaity
Notary Public
My Commission Expires 3/10/41

NATIONAL ASSOCIATION OF PERFORM-
ING ARTISTS by JAMES J. WALKER
and FRED WARING, Trustees Ad
Litem

Vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC., KEITH
TAILORS, INC., ROYAL SHOE
MARKET, INC., MORRIS EISENBERG
and HERMAN SCHAEFFER, Indivi-
dually and Trading as BAILEY'S
FURNITURE CO.

:
:
: C. P. NO. 6
:
: DECEMBER TERM, 1939
:
: NO. 4508
:
: IN EQUITY
:

STIPULATION OF COUNSEL

AND NOW, March 21, 1940, it is agreed between Speiser
& Speiser, Esquires, Attorneys for the plaintiff and Wolf, Block,
Schorr and Solis-Cohen, Esquires, Attorneys for the defendant Wm.
Penn Broadcasting Company, that the Order of your Honorable Court,
dated the 9th day of March, 1940 removing the above entitled cause
to the United States District Court for the Eastern District of
Pennsylvania be rescinded, with leave to the plaintiff to reply
or otherwise answer the said defendant's petition for removal
within ten days from the date hereof.

SPEISER & SPEISER

/s/ Herbert A. Speiser

Attorneys for Plaintiff

WOLF, BLOCK, SCHORR & SOLIS-COHEN

Attorneys for defendant, Wm. Penn
Broadcasting Company

AND NOW, March 21, 1940, the foregoing agreement is
approved.

Flood

P.J.

NATIONAL ASSOCIATION OF PERFORM-
ING ARTISTS by JAMES J. WALKER
and FRED WARING, Trustees Ad
Litem

STATE OF NEW YORK
Vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC., KEITH
TAILORS, INC., ROYAL SHOE
MARKET, INC., MORRIS EISENBERG
and HERMAN SCHAEFFER, Indivi-
dually and Trading as BAILEY'S
FURNITURE CO.

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C. P. NO. 6

DECEMBER TERM, 1939

NO. 4508

IN EQUITY

ANSWER TO PETITION FOR REMOVAL RAISING
QUESTIONS OF LAW

The National Association of Performing Artists, the plaintiff in the above entitled cause, reserving its right hereafter, if necessary, to answer the averments in the Petition for Removal filed by the defendant Wm. Penn Broadcasting Company, suggests and avers that the said petition is insufficient in law for the following reasons:-

1. The petition presents no cause for removal.
2. The petition presents no facts upon which the order or removal prayed may be granted.
3. The petition presents the mere conclusion of the defendant without any factual basis in support of such conclusion.
4. The plaintiff is unable to reply to the said petition for failure of the averment of any facts to which plaintiff can reply.
5. The petition is contradicted by the plaintiff's Bill in Equity filed in the cause which was part of the record therein at the time the petition was filed.

WHEREFORE, plaintiff respectfully requests the court to hear and dispose of the questions of law so raised and dismiss the defendant's petition for removal.

/s/ JAMES J. WALKER

Given
and read before me, James J. Walker, a
Notary Public for the State of New York,
my commission expires March 30, 1940.

C. B. NO. 9

STATE OF NEW YORK
COUNTY OF NEW YORK

SS:

JAMES J. WALKER,

being duly sworn

according to law, deposes and says that he is one of the Trustees
Ad Litem in the above entitled cause of action; that he is advised
believes and therefore avers that the Petition for Removal filed
by the defendant Wm. Penn Broadcasting Company is not sufficient
in law, for the reasons hereinbefore set forth.

SWORN TO AND SUBSCRIBED :

BEFORE ME THIS 22 DAY : /s/ JAMES J. WALKER

OF MARCH, A. D. 1940 :

(SEAL)

/s/ LAZARUS ROSENBLATT :
Notary Public

Notary Public, New York County
New York County Clerk's No. 474
New York County Reg. No. OR 607
Commission Expires March 30, 1940

NATIONAL ASSOCIATION OF PERFORMING : C. P. No. 6
 ARTISTS by JAMES J. WALKER and
 FRED WARING, Trustees Ad Litem : Inc., and Bailey's
 Furniture Co. (hereinafter referred to as "advertisers")
 vs. :
 WM. PENN BROADCASTING COMPANY, : December Term, 1939
 P. B. WHITE CO., INC., :
 KEITH TAILORS, INC., :
 ROYAL SHOE MARKET, INC., :
 MORRIS EISENBERG and HERMAN :
 SCHAEFFER, Individually and :
 Trading as BAILEY'S FURNITURE CO. : No. 4508 In Equity

AMENDED PETITION FOR REMOVAL TO
 THE FEDERAL COURT

(a) Your petitioner avers that the plaintiffs
 TO THE HONORABLE, THE JUDGES OF SAID COURT:

The petition of WM. PENN BROADCASTING COMPANY, one
 of the defendants above named, respectfully represents to this
 County of Philadelphia and was from time to time have purchased
 Honorable Court:

1. The above entitled action has been brought in
 this court and is now pending therein; and the time within
 which the defendant is required to answer or otherwise plead
 has not yet expired.

2. Said action is of a civil nature and the value
 of the matter in controversy is in excess of \$3,000.00.

3. (a) The said action involves a controversy
 solely between the plaintiffs who are stated in the Bill in
 Equity to be an unincorporated voluntary association organized
 and existing under and by virtue of the laws of the State of
 New York, and the defendant Wm. Penn Broadcasting Company,
 which is a corporation organized and existing under and by
 virtue of the laws of the State of Delaware,

(b) The defendants P. B. White, Co. Inc., Keith Tailors, Inc., Royal Shoe Market, Inc., and Bailey's Furniture Co. (hereinafter referred to as "advertisers") are improperly joined and have not been joined in good faith by the plaintiffs, the plaintiffs knowing or having cause to know that the averments in the Bill in Equity to the effect that the said advertisers are co-adventurers with the defendant Wm. Penn Broadcasting Company and that the said advertisers participated in the broadcasting of the phonograph records which are the basis of the plaintiffs Bill in Equity are not correct.

(c) Your petitioner avers that the plaintiffs have and can have no cause or right of action against the said advertisers for the following reasons. The said advertisers are business men conducting business enterprises in the City and County of Philadelphia and who from time to time have purchased advertising time on Station WPEN, operated by the Wm. Penn Broadcasting Company. None of the said advertisers except P. B. White Co. Inc., are sponsors of any programs but merely purchase "spot announcements" of their wares and merchandise, which are interspersed from time to time during the course of certain programs over Station WPEN. The contracts between the Station and these advertisers do not specify any particular time when the announcement is to be made, give the advertiser no control or direction of any kind over the program or over the material which is broadcast thereon, the advertisers merely submitting the script of the advertising which he desires to be announced and the Station agreeing to make a certain number of announcements of the advertising material during each day or week, as the case may be. P. B. White Co., Inc., is the sponsor of a program, but its contract does not give the advertiser any

the defendant's motion for summary judgment on the ground that the plaintiff's motion for summary judgment was not timely filed. The court granted the defendant's motion and dismissed the plaintiff's motion for summary judgment. The court also granted the defendant's motion for summary judgment on the ground that the plaintiff's motion for summary judgment was not timely filed. The court also granted the defendant's motion for summary judgment on the ground that the plaintiff's motion for summary judgment was not timely filed.

control or direction of any kind over the program or over the material which is broadcast thereon, P. B. White Co., Inc., merely submitting the script of the advertising which it desires to be announced, and the Station agreeing to make such announcements of the advertising material during the program, the contract providing merely that it shall be a "dance music" program. None of the advertisers, including P. B. White Co., Inc., ever have or could have any control over the music or musical compositions which are broadcast over the defendant's Station, nor can they control the selection of compositions which are broadcast (the same being in the sole and exclusive control of the Station). The Station may broadcast any type of musical composition or (as to the "spot announcement" contracts), any other type of program which it deems best suited for the purposes of the Station and the advertiser has no control, no right to complain and will have no remedy if the advertiser is dissatisfied with the program, other than to decline to renew the contract when the contract expires. All of the foregoing facts were well known to the plaintiffs and the joinder of the said additional defendants was made by the plaintiffs solely for the purpose of preventing the removal of this cause of action to the Federal Court.

4. Your petitioner presents herewith a good and sufficient bond as provided by statute in such cases, that it will enter in the District Court of the United States for the Eastern District of Pennsylvania within thirty days from the date of filing of this Amended Petition a certified copy of the record in this suit, and that it will pay all costs which may be awarded by the said District Court in case the said District

to be understood that the affidavit submitted in support of the
motion is submitted on behalf of the undersigned party to the
undersigned party is produced in support of the motion to the
court or execution of the writ and the block of each the

Court shall hold that this suit was wrongfully or improperly
removed thereto.

WHEREFORE your petitioner prays that this court
proceed no further herein excepting to make an order accepting
the bond presented herewith, and directing that a transcript
of the record herein be made and filed in the United States
District Court aforesaid.

and that the facts set forth in the foregoing petition
are true to the best of WM. PENN BROADCASTING COMPANY belief.

Sworn to and subscribed By: (Sgd.) Harold A. Lafount

before me this 17th day

of April, 1940

George Cohen
Notary Public

My Commission Expires

3/10/41

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS by JAMES J. WALKER and
STATE OF NEW YORK ss
COUNTY OF NEW YORK :

C. P. NO. 3

WM. PENN BROADCASTING COMPANY,
F. B. SMITH CO. INC.,
SWISS CANNONS, HAROLD A. LAFOUNT, being duly sworn according to
NOTAL BOOK HANDBOOK, INC.,

December Term, 1939

law, deposes and says that he is Vice-President of Wm. Penn
Broadcasting Company, petitioner above named; that he is
authorized to and does make this affidavit for and on its
behalf; and that the facts set forth in the foregoing petition
are true to the best of his knowledge, information and belief.
This cause coming on for hearing upon Petition and

Sworn to and subscribed
before me this 17th day (Sgd.) Harold A. Lafount
of April, 1940
Court for the Eastern District of Pennsylvania, and it appearing

(Seal)

to the Court that the defendant has filed the Petition for such
removal in due form of law and that the defendant has filed its
Notary Public
My Commission Expires 3/30/42
and it appearing to the Court that this is
a proper cause for removal to the said District Court,

Now therefore, said Petition and Bond are hereby
accepted and it is hereby ordered and adjudged that this cause
be and it is hereby removed to the United States District Court
for the Eastern District of Pennsylvania, and the Clerk is
hereby directed to make up the record in said cause for trans-
mission to said Court forthwith.

Dated this 25th day of April, 1940.

BY THE COURT.

Bok
P
-5-

CORRECTION OF NAME : 1

REVISION OF NAME : 1

NATIONAL ASSOCIATION OF PERFORMING : C. P. NO. 6
ARTISTS by JAMES J. WALKER and :
FRED WARING, Trustees Ad Litem :
vs. :
WM. PENN BROADCASTING COMPANY, : December Term, 1939
P. B. WHITE CO. INC., :
KEITH TAILORS, INC., :
ROYAL SHOE MARKET, INC., :
MORRIS EISENBERG and HERMAN :
SCHAEFFER, Individually and Trading :
as BAILEY'S FURNITURE CO. : No. 4508 In Equity

O R D E R

This cause coming on for hearing upon Petition and Bond of the defendant, Wm. Penn Broadcasting Company, for an order transferring this cause to the United States District Court for the Eastern District of Pennsylvania, and it appearing to the Court that the defendant has filed its Petition for such removal in due form of law and that the defendant has filed its Bond duly conditioned, with good and sufficient sureties, as provided by law, and that defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to the said District Court,

NOW THEREFORE, said Petition and Bond are hereby accepted and it is hereby ORDERED AND ADJUDGED that this cause be and it is hereby removed to the United States District Court for the Eastern District of Pennsylvania, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Dated this 25th day of April, 1940.

BY THE COURT,

Bok

P. J.

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

: C. P. NO. 6

Vs.

: DECEMBER TERM, 1939

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC., KEITH
TAILORS, INC., ROYAL SHOE
MARKET, INC., MORRIS EISENBERG
and HERMAN SCHAEFFER, Indivi-
dually and trading as BAILEY'S
FURNITURE CO.

: NO. 4508 IN EQUITY

ANSWER TO AMENDED PETITION FOR REMOVAL
RAISING QUESTIONS OF LAW

The National Association of Performing Artists,
the plaintiff in the above entitled cause, reserving its right
hereafter, if necessary, to answer the averments in the Petition
for Removal filed by the defendant Wm. Penn Broadcasting Company,
suggests and avers that the said petition is insufficient in law
for the following reason:-

The petition presents no cause for removal.

WHEREFORE, plaintiff respectfully requests the
court to hear and dispose of the questions of law so raised and
dismiss the defendant's petition for removal.

/s/ HERBERT A. SPEISER

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

SS:

HERBERT A. SPEISER, being duly sworn according to law, deposes and says that he is the attorney for the plaintiff, in the above entitled cause of action; that he believes and therefore avers that the Petition for Removal filed by the defendant Wm. Penn Broadcasting Company is not sufficient in law, for the reason hereinbefore set forth.

SWORN TO AND SUBSCRIBED :

BEFORE ME THIS 20th DAY : /s/ HERBERT A. SPEISER

OF APRIL, A. D. 1940 :

(SEAL)

/s/ DAVID BALAITY :
Notary Public

My Commission Expires March 10, 1941

COUNTY OF PHILADELPHIA, ss.

I, JOHN M. SCOTT, Esquire, Prothonotary of the Courts of Common Pleas of the County of Philadelphia, acting by my Principal Deputy, Meredith Hanna, or my Second Deputy, John J. Hoerr, DO CERTIFY that the foregoing is a true copy of the Record: _____

NATIONAL ASSOCIATION OF PERFORMING ARTISTS by JAMES J. WALKER and FRED WARING, Trustees Ad Litem Plaintiff, and

WM. PENN BROADCASTING COMPANY, et al, _____ Defendant, of _____ December _____ Term, 1939 Number _____ 4508 as full, entire and complete as the same remains on file in Court of Common Pleas No. _____ 6 _____ of the County of Philadelphia aforesaid, in the case above stated.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this _____ 28th _____ day of _____ May _____ in the year of our Lord one thousand nine hundred forty (1940)

JOHN M. SCOTT, Prothonotary.

By Meredith Hanna
Principal Deputy Prothonotary
Durante Absentia, Secundum Legem.

COUNTY OF PHILADELPHIA, ss.

I, _____ CURTIS BOK _____, Presiding Judge of the Court of Common Pleas No. _____ 6 _____, for the County of Philadelphia, DO CERTIFY that the foregoing Record, Certificate and Attestation made by _____ MEREDITH HANNA, Principal _____ Deputy Prothonotary of the said Court, whose name is thereunto subscribed, and the seal of the said Court affixed, are in due form and made by the proper officers.

IN TESTIMONY WHEREOF, I have hereunto set my hand this _____ 28th _____ day of _____ May _____, in the year of our Lord one thousand nine hundred forty (1940)

Curtis Bok
President Judge, Court of Common Pleas No. 6

COUNTY OF PHILADELPHIA, ss.

I, JOHN M. SCOTT, Esquire, Prothonotary of the Courts of Common Pleas of the County of Philadelphia, acting by my Principal Deputy, Meredith Hanna, or my Second Deputy, John J. Hoerr, DO CERTIFY that the honorable _____ CURTIS BOK _____ by whom the foregoing Certificate and Attestation were made, and whose name is thereto subscribed, was at the time of making thereof and still is, Presiding Judge of the Court of Common Pleas No. _____ 6 _____ of the County of Philadelphia duly commissioned and sworn; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this _____ 28th _____ day of _____ May _____ in the year of our Lord one thousand nine hundred forty (1940)

JOHN M. SCOTT, Prothonotary.

By Meredith Hanna
Principal Deputy Prothonotary
Durante Absentia, Secundum Legem.

Kirkpatrick

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF PERFORMING
ARTISTS, by JAMES J. WALKER and
FRED WARING, Trustees Ad Litem

vs.

WM. PENN BROADCASTING COMPANY,
P. B. WHITE CO., INC.
KEITH TAILORS, INC.,
ROYAL SHOE MARKET, INC.,
MORRIS EISENBERG AND HERMAN
SCHAEFFER, individually and trad-
ing as BAILEY'S FURNITURE CO.

CIVIL ACTION

FILE NO. 939

ON PLAINTIFF'S MOTION TO REMAND

OPINION

APRIL 25, 1941

BARD, J.:

This case comes before the Court at this time on plaintiff's motion to remand to the Common Pleas Court of Philadelphia County, Pennsylvania, from which court it was removed on the application of the defendant, Wm. Penn Broadcasting Company.

The plaintiff's bill in equity alleges that the defendant Wm. Penn Broadcasting Company owns and operates a radio station; that the other defendants contracted with the management

of this station for advertisement of the business of these other defendants; and that on programs advertising these businesses, phonograph records, made by members of the plaintiff association, were played and broadcast without permission of plaintiff and in violation of the property rights of the plaintiff.

The particular relief sought in the bill is an injunction restraining all defendants from using or causing to be used any phonograph records embodying renditions, interpretations and performances of any member or members of the plaintiff, for radio broadcast or any other commercial use without the consent or permission of the plaintiff. The bill concludes with the customary plea for further relief as may seem just and proper.

Defendants Wm. Penn Broadcasting Company and P. B. White Co., Inc. are corporations organized and existing under the laws of the State of Delaware. The other defendants are Pennsylvania corporations or individual residents of Pennsylvania.

In its petition for removal, the Wm. Penn Broadcasting Company alleged that the action involves a controversy solely between the plaintiff and it, and that the other defendants were improperly joined to prevent removal of the cause. After argument had, the petition for removal was granted by the State court.

Pursuant to its position that the suit does not involve a controversy solely between the Wm. Penn Broadcasting Company and the plaintiff, one within the jurisdiction of a federal court, the plaintiff has moved that the action be remanded to the State court. The plaintiff contends that all of the defendants are involved in the controversy.

Testimony was taken before the court to enable

determination of the relationship of the defendant advertisers to the defendant station and to the programs during which their businesses were advertised. In the light of this evidence it appears that none of the defendant advertisers had the right to or did exercise any control over the determination of what records were to be played. Those who designated particular programs during which their advertisements were to be read knew the nature of the entertainment broadcast or the program in which they participated. The other, who contracted for announcements at particular times between programs or at times chosen by the radio station, did not participate in any manner, and usually had no interest in or concern for the character of the programs at, before, or after the time its advertisements were read. None contracted for a particular period during which it could determine the nature or identity of entertainment broadcast, and admittedly none had any control whatever over the program preceding or following their announcements. In other words, choice and playing of the records were in all cases controlled exclusively by the defendant station.

The plaintiff urges that, assuming an utter lack of control by the defendant advertisers over the defendant station's selection and execution of programs, it does not necessarily follow that the complaint fails to state a claim against the defendant advertisers. This proved lack of control, it is argued, does not determine the complaint to be legally insufficient.

It is well settled, under the pertinent law, that a performer who makes a phonograph record and causes to be affixed thereto a notice of a restriction that it is not licensed for commercial radio broadcast, may restrain the use of such by

a radio station. *Waring v. WDAS Station, Inc.*, 327 Pa. 433.

Whether this restraint can be extended to an advertiser who has and exerts no control over the conduct of the broadcasts during or between which advertising announcements, with no relation to the broadcast entertainment, are read, appears to be a question upon which there has been no illumination.

The plaintiff contends that this is a doubtful question, one that might, on trial, be resolved in its favor. It further contends that, on the instant motion, this court should not determine doubtful questions of law, that such must be tried in the court which has jurisdiction. In this latter contention, the plaintiff is supported by authority. *Chicago, R. I. & Pac. Ry. v. Schwyhart*, 227 U. S. 184; *Locke v. St. Louis-San Francisco Ry. Co.* 37 F. 2d 418; *Ervin v. Texas Co.*, 97 F. 2d 806. However, I am decided that the restraint applied in the *Waring* case, *supra*, cannot be extended to the instant defendant advertisers, and that, therefore, there is no doubtful question which might be resolved in the plaintiff's favor.

Inasmuch as the defendant advertisers have not exercised, threatened to exercise or had the power to exercise any control over the acts of the station in playing records, I am decided there has not been, is not now, and does not promise to be, any violation of the plaintiff's property rights by the defendant advertisers. I am, therefore, altogether unable to define any basis upon which an injunction could issue restraining the defendant advertisers.

Furthermore, it is difficult to forecast any practical value in or effect of an injunction restraining the defendant advertisers from broadcasting or causing to be broadcast records of plaintiff's members. The advertisers have no voice in the

selection of records to be played and exercise no control over the playing of records. It follows, then, that any such injunction would be a practical nullity; it would enjoin the defendant advertisers from doing something they were powerless to do in any event. Furthermore, if the plaintiff is entitled to relief, an injunction against the broadcasting company would protect it fully.

The claim of joint liability appears clearly unsound, without colorable grounds and, therefore, insupportable. Something other than the mere relation of advertiser and station operator must exist to support an action against the advertising defendants for violation of the plaintiff's property rights by programs broadcast by the station. I am decided that the bill states a claim solely against the Wm. Penn Broadcasting Company.

The motion therefore must be and hereby is denied.
